82-1307

No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

LEWIS T. GRAHAM,

Appellant,

v.

THE STATE OF LOUISIANA,

Appellee.

On Appeal From The Supreme Court Of Louisiana

JURISDICTIONAL STATEMENT

BOBBY D. SUTTON
Counsel of Record
GLENN E. WALKER
Of Counsel
BURNETT, SUTTON, WALKER & CALLAWAY
(A Professional Law Corporation)
1400 Youree Drive
Shreveport, Louisiana 71101
Tel. (318) 221-3131

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QUESTIONS PRESENTED

(1) Did the Louisiana Supreme Court err in concluding that the Louisiana jury privilege statute, R.S. 15:470, is not violative of the Sixth and Fourteenth Amendments to the United States Constitution even though it prohibits a showing of actual prejudice arising from jurors having considered matters found by the Court to be outside the record?

(2) Did the Louisiana Supreme Court err in concluding that the Louisiana non-unanimous jury verdict authorities (Louisiana Constitution Article 1, Section 17, repeated in Code of Criminal Procedure Article 782) and the Louisiana mandatory penalty authority (R.S. 14:30.1) are not violative of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution even though they authorize a non-unanimous verdict by a twelve-member jury when there is no discretion in sentencing, and the penalty upon conviction is necessarily life imprisonment without benefit of parole, probation or suspension of sentence?

(3) Under Louisiana R.S. 15:438, "The rule as to circumstantial evidence cases is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." Did the Louisiana Supreme Court err in holding that the Fourteenth Amendment to the United States Constitution as announced in *Jackson vs. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979), is not applicable to an affirmative prosecutorial duty as set forth in Louisiana R.S. 15:438?

LISTING OF PARTIES TO THE PROCEEDING

The parties to this proceeding are:

(1) Lewis T. Graham, Jr., defendant—appellant.

(2) The State of Louisiana, appellee, through:

William J. Guste, Jr., Attorney General of the State of Louisiana; Barbara Rutledge, Assistant Attorney General of the State of Louisiana; Paul J. Carmouche, District Attorney for Caddo Parish, Louisiana; and Dale G. Cox, Assistant District Attorney for Caddo Parish, Louisiana.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

Entitled "State of Louisiana v. Lewis T. Graham, Jr.," this case bore docket number 114,292 on the criminal docket of the First Judicial District Court, Caddo Parish, Louisiana. Under the same title, on appeal to the Louisiana Supreme Court the case bore docket number 81-KA-3328.

Unofficially, the case is reported as *State v. Graham*, 422 So.2d 123 (1982). There is no separate official report of this decision.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Appellant was convicted of second degree murder under Louisiana R.S. 14:30.1 in the District Court. The

opinion of the Louisiana Supreme Court was rendered on October 18, 1982, affirming the ruling of the trial court, (App. 1a-23a); application for rehearing was denied on December 10, 1982 (App. 25a). Notice of Appeal was filed with the Louisiana Supreme Court on February 1, 1983 (App. 27a-28a).

The October 18, 1982 ruling, now final after denial of rehearing, is presented on appeal. An appeal lies under 28 U.S.C. 1257(2) because the Louisiana Supreme Court upheld the validity of Louisiana R.S. 15:470 (the state jury privilege statute), Louisiana Constitution Article 1, Section 17, repeated in Code of Criminal Procedure Article 782 (the state's non-unanimous verdict authorities), R.S. 14:30.1 (the state's mandatory penalty provision) and R.S. 15:438 (the state circumstantial evidence rule), against the ground that they were repugnant to the Constitution of the United States.

R.S. 15:470 was challenged as being repugnant to the Sixth and Fourteenth Amendments to the United States Constitution (App. 35a-37a, 39a-40a, 56a).

Louisiana Constitution Article 1, Section 17, and Code of Criminal Procedure Article 782 were challenged as being repugnant to the Sixth and Fourteenth Amendments to the United States Constitution (App. 33a-35a, 37a, 39a, 40a, 55a, 56a). R.S. 14:30.1 was challenged as being repugnant to the Eighth and Fourteenth Amendments to the United States Constitution (App. 40a, 56a).

The failure of the Louisiana Supreme Court to interpret R.S. 15:438 in light of the holding of *Jackson v. Virginia*, supra, was challenged as being repugnant to the Fourteenth Amendment to the United States Constitution (App. 31a, 32a, 37a, 55a, 56a).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment, United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

* * * * *

Article 1, Section 17, Louisiana Constitution:

> Section 17. A Criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to

render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

Article 4, Section 5, Louisiana Constitution:

Section 5. Governor; Powers and Duties

* * * * *

(E) Pardon, Commutation, Reprieve, and Remission; Board of Pardons.

(1) The governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses. However, a first offender never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, with a recommendation of the Board of Pardons and with action by the governor.

* * * * *

Louisiana Code of Criminal Procedure, C.Cr.P. Article 782:

A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard

labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases.

Louisiana Code of Criminal Procedure, C.Cr.P. Article 893:

A. When it appears that the best interest of the public and of the defendant will be served, the court, after conviction of a felony for which the punishment is with or without hard labor or a felony which is a violation of the Controlled Dangerous Substances Law of Louisiana, noncapital felony, may suspend for the first conviction only the imposition or execution of any sentence, where suspension is allowed under the law and in either case place the defendant on probation under the supervision of the division of probation and parole supervision. The period of probation shall be specified and shall not be less than one year nor more than five years. The suspended sentence shall be regarded as a sentence for the purpose of granting or denying a new trial or appeal.

* * * * *

Louisiana Code of Criminal Procedure, C.Cr.P. Article 894.1:

A. When a defendant has been convicted of a felony or misdeameanor, the court should impose a sentence of imprisonment if:

(1) There is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;

(2) The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution; or

(3) A lesser sentence will deprecate the seriousness of the defendant's crime.

B. The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:

(1) The defendant's criminal conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There was substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(5) The victim of the defendant's criminal conduct induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime;

(8) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(10) The defendant is particularly likely to respond affirmatively to probationary treatment; and

(11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents.

C. The court shall state for the record the considerations taken into account and the factual basis therefor in imposing sentence.

Louisiana Revised Statutes, R.S. 14:30.1:

Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

Louisiana Revised Statutes, R.S. 15:438:

The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.

Louisiana Revised Statutes, R.S. 15:470:

No juror, grand or petit, is competent to testify to his own or his fellows' misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct or of the findings of the body of which he is or was a member.

Louisiana Revised Statutes, R.S. 15:572:

> A. The governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons as hereinafter provided for by this Part, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses.
>
> * * * * *

STATEMENT OF THE CASE

Lewis T. Graham, Jr., hereafter sometimes "appellant" or "defendant," and Kathleen Fay Thibodeaux Graham were husband and wife and resided in Shreveport, Caddo Parish, Louisiana. The three minor children of the marriage resided with them. Mrs. Graham was killed in the master bedroom of the family home in the early morning hours of March 31, 1980. Appellant related that he had been awakened by his wife and told that she had "heard a noise" in the house; appellant arose, walked through the house, found nothing out of order, and returned to bed. Appellant related that subsequently he was again awakened by a lurch of the bed and a stifled scream from Mrs. Graham; that he had been physically removed from the bed by what felt like more than one person; that he struggled and was stabbed in the left chest area; that he was thrown against the bedroom wall, striking his head, and rendered unconscious for an unknown time. Appellant further stated that, upon regaining consciousness, he called the police and a neighbor for help, both of whom came immediately.

Mrs. Graham died of massive head wounds. Appellant exhibited a puncture wound to his left chest area, a contusion to his right forehead, and a cut across the entire palm of his left hand. A four-pound hammer and a hunting

knife were found on the floor of the bedroom, both of which belonged to the Graham household and were ordinarily kept in the garage. The hammer was consistent with the type of instrument that wounded Mrs. Graham, as was the knife with appellant's wounds.

The overhead garage door was found partially raised, and the door leading from the garage into the house was ajar; various marks were on the doorfacing and a crowbar was found on the garage floor in front of the entranceway to the house. Inside the home, den cabinet doors were found open and several liquor bottles and a pair of binoculars had been removed and were found on the floor; a plastic flashlight and a tin can containing money had also been removed from the cabinet and were found outside the house.

On July 15, 1980, appellant was indicted by the Caddo Parish Grand Jury on a charge of second degree murder. Trial commenced July 13, 1981. Crucial to the issue of guilt or innocence was expert testimony from both sides concerning conclusions to be drawn from blood spatter patterns at the crime scene, and the State's contention that some blood coagulated before it was spattered.

During the trial, the State argued that the most important evidence of appellant's guilt was the presence of two spots of allegedly coagulated blood on the front of appellant's shorts; coagulated spots on the front of his shorts would be inconsistent with appellant's defense.

On August 2, 1981, appellant was adjudged guilty as charged by a minimum acceptable verdict, with 10 jurors of 12 voting to convict and two voting to acquit. As later found by the Louisiana Supreme Court, 422 So.2d 123, 130, see also App. 7a, the case against appellant had been entirely circumstantial.

Shortly after the conviction, but before sentencing, it was revealed that upon deliberation the jury had been unable to reach a verdict and retired for the night; that thereafter, one juror conducted an experiment in the presence of four others in a motel room to determine the coagulation time of his blood; and that the jury then returned the minimum 10-to-2 verdict of guilty. (App. 9a-10a.)

On August 18, 1981, appellant filed a motion for new trial in the District Court alleging in part that there was insufficient evidence from which any juror could have concluded that guilt had been established beyond a reasonable doubt and that there was insufficient evidence from which any juror could have concluded that every reasonable hypothesis of innocence had been excluded. (App. 31a.)

On September 2, 1981, appellant supplemented his motion for new trial, complaining that the non-unanimous jury verdict resulting in a non-discretionary life sentence without parole, probation or suspension of sentence was violative of the Sixth and Fourteenth Amendments to the United States Constitution (App. 33a-34a); on September 28, 1981, appellant filed a motion in arrest of judgment documenting his prior complaints *via* motion for new trial and additionally raising the complaint that the mandatory sentencing scheme of R.S. 14:30.1 offended the Eighth and Fourteenth Amendments to the United States Constitution especially as aggravated by the existence of a non-unanimous jury verdict. (App. 39a-40a.)

On September 16, 1981, appellant again supplemented his motion for new trial complaining that the extra-record jury experiment deprived him of rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and that insofar as R.S. 15:470 pre-

vented a showing of such violation, it was repugnant to the Sixth and Fourteenth Amendments; and, that the standard of proof employed in reaching the guilty verdict was violative of the Sixth and Fourteenth Amendments. (App. 35a-37a.)

On September 21 and 24, and October 10, 1981, an evidentiary hearing was had regarding the allegations raised in appellant's motions for new trial and in arrest of judgment. During the hearing, the trial court sustained the State's objection when appellant attempted to question jurors Ethridge and Reeves as to whether a vote change occurred after juror Ethridge conducted the blood coagulation experiment in the motel room. (App. 41a-44a.)

On October 10, 1981, the trial judge, the Honorable C. J. Bolin, Jr., denied the motion for new trial and the motion in arrest of judgment (App. 46a); thereafter, appellant was sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. (App. 49a-51a.)

An appeal to the Louisiana Supreme Court timely followed on October 10, 1981 (App. 53a). On December 15, 1981, assignments of error were filed, which included the following:

> That the special 'blood test' conducted by juror Ethridge outside the jury deliberation room but in the presence of four other jurors, and communicating the results thereof to the other four jurors, and then changing his vote from 'not guilty' to 'guilty' on the basis of such special blood test was prejudicial error"; (App. 56a.)
>
> * * * * *
>
> The trial judge's sustaining of the District Attorney's objection to defendant submitting evidence of jury

misconduct, under the authority of R.S. 15:470, was prejudicial error in that R.S. 15:470 is violative of the Sixth and Fourteenth Amendments to the United States Constitution; (App. 56a.)

* * * * *

Defendant was tried and convicted under Article I, Section 17 of the Louisiana Constitution and Code of Criminal Procedure Article 782, which are violative of the Sixth and Fourteenth Amendments to the United States Constitution in that they authorize a non-unanimous jury verdict for a crime that mandates a penalty of life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. (App. 55a, 56a.)

* * * * *

The penalty provision of R.S. 14:30.1 is violative of the Eighth and Fourteenth Amendments of the United States Constitution as well as Article 1, Sections 2, 3 and 20 of the Louisiana Constitution. (App. 56a.)

* * * * *

The verdict is contrary to the law and the evidence in that there was insufficient evidence from which reasonable persons could have concluded that guilt had been established beyond a reasonable doubt; (App. 55a.)

* * * * *

The trial court's overruling of defendant's Motion for New Trial was error and contrary to law; (App. 56a.)

* * * * *

The trial court's overruling of defendant's Motion In Arrest of Judgment was error and contrary to law; (App. 56a.)

In its ruling on the constitutionality of R.S. 15:470, the Louisiana Supreme Court found as a fact that the jury was deadlocked before the experiment; that the experiment went outside the record; that the experiment corroborated the prosecution's case; and that on the first vote after the experiment a conviction was obtained (App. 9a, 10a, 12a). But the Court utilized the jury privilege statute, R.S. 15:470, to prevent appellant from completing the record to show that the juror who conducted the experiment changed his vote on that basis from not guilty to guilty, thereby becoming the tenth juror to convict. Specifically, the ruling was that an ultimate fact inquiry into whether the juror had changed his vote after and due to the experiment amounted to a prohibited inquiry into his mental processes. The Court held:

> Because the accused is not required to show actual prejudice, the state may legitimately invoke the prohibition of R.S. 15:470 to bar inquiry into the mental processes of an individual juror. (App. 10a, 11a.)
>
> * * * * *
>
> In the present case, the trial judge correctly followed the law at the new trial motion hearing by taking evidence upon the allegations of unconstitutional and prejudicial juror misconduct. He also correctly excluded any evidence of actual effect or prejudice upon the jury deliberations. Finally, he ruled correctly in our opinion that it had not been shown that a reasonable possibility of prejudice existed. (App. 11a.)

Regarding a non-unanimous verdict by a twelve-member jury which includes a mandatory life sentence without parole, probation or suspension of sentence, the

Court separated each element of the issue appealed and held:

> By this assignment of error, the defendant contends that the mandatory imposition of a sentence of life imprisonment at hard labor without benefit of probation, parole or suspension of sentence for second degree murder constitutes cruel and unusual punishment in violation of La. Const. art. I, § 20 (1974) and the Eighth and Fourteenth Amendments of the United States Constitution. We have rejected this argument consistently. See, e.g. State v. Landry, 388 So.2d 699, 706 (La. 1980); State v. Brooks, 350 So.2d 1174 (La. 1977).
>
> The defendant also asserts that the mandatory sentence unconstitutionally denies the defendant the right to have the trial court exercise its discretion in imposing sentences under La.C.Cr.P. arts. 893 and 894.1. However, we have recognized that the decision to assess mandatory life sentences for certain felonies is within the prerogative of the legislature. State v. Prestridge, 399 So.2d 564, 582 (La. 1981).
>
> The defendant further contends that the use of the non-unanimous verdict violates the Sixth and Fourteenth Amendments and Louisiana Constitution article I, § 16 (1974). We recently rejected such an argument in State v. Belgard, 410 So.2d 720, 727 (La. 1982). In doing so, we expressly followed decisions of the United States Supreme Court in its approval of the non-unanimous verdict in certain cases. See Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed2d 152 (1972); Apodaca v. Oregon, 406 U.S. 404, 32 L.Ed. 2d 184 (1972).
>
> Accordingly, these assignments of error lack merit. (App. 17a, 18a.)

Concerning the effect of *Jackson* v. *Virginia*, supra, upon R.S. 15:438, the state circumstantial evidence rule, the Court held:

> In previous opinions we have attempted to formulate a single precept incorporating both [*Jackson* v. *Virginia* and R.S. 15:438] standards. See e.g., State v. Austin, 399 So.2d 158 (La. 1981). ("Therefore, when we review a conviction based upon circumstantial evidence we must determine that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded." *Id.* p. 160.) Upon further reflection, however, a merger does not appear to promote clarity but could lead to a distortion of the standards. . . . [O]ut of an abundance of caution we will proceed to apply each standard separately, as it was given to us by the framers. (App. 6a.)

The Louisiana Supreme Court denied rehearing on these issues on December 10, 1982.

THE QUESTIONS ARE SUBSTANTIAL

1. The Jury Privilege Statute/Actual Prejudice.

Did The Louisiana Supreme Court Err In Concluding That The Louisiana Jury Privilege Statute, R.S. 15:470, Is Not Violative Of The Sixth And Fourteenth Amendments To The United States Constitution Even Though It Prohibits A Showing Of Actual Prejudice Arising From Jurors Having Considered Matters Found By The Court To Be Outside The Record?

Succinctly, this case presents the important question of whether a state's interest in inviolability of jury verdicts validates legislation prohibiting a demonstration of actual prejudice flowing from a juror's consideration of evidence

outside the record, an issue of considerable import.[1] The objectionable holding was that a defendant in such circumstances is limited to relief on an implied prejudice basis, the determination of which is itself premised upon an incomplete factual review because developed under the spectre of the state's jury privilege statute.

Assessment of the effect of extraneous matters upon jurors has long been recognized by the Court as a substantial issue, ". . . for obvious reasons." *Remmer* v. *United States*, 347 U.S. 227, 229, 98 L.Ed. 654, 74 S.Ct. 450 (1954). Prior to *Remmer*, the Court in *Dennis* v. *United States*, 339 U.S. 162, 94 L.Ed. 734, 70 S.Ct. 519

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[1] It appears that 34 states by statute or jurisprudence tend to exclude only evidence of jurors' mental processes, whereas another 15 states, including Louisiana, are significantly more restrictive. No rule either way was found for one state, New Hampshire. Statutes following exclude evidence of jurors' mental processes only: 17 Ariz. R.S. Rule Crim. Proc. 24-1; Ark. Stat. 28-1001, Rule 606(b); West Ann. Cal. Evid. Code § 1150; Kan. Stat. Ann. 60-441; 50 Minn. Ann. Evid. Code 606(b); Neb. R.S. § 26-6062; Nev. R.S. § 50.065; N.M. Stat. Ann. Evid. Rule 606(b); N.C. Gen. Stat. § 15(a)-1240; N.D. Stat. Ann. Rule Evid. 606(b); S.D. Code § 19-14-7; Utah Code Ann. Evid. Rule 44; Wash. R.S. § 5.60.010; Wisc. Stat. Ann. 906.06 § 2; Wyo. Rev. Evid. Code § 606(b). Cases following exclude evidence of jurors' mental processes only: Josephson v. Meyers, 429 A.2d 877 (Conn. 1980); Parker v. State, 336 So.2d 426 (Fla. App. 1st Dist. 1976); Dwight v. Ichiyama, 24 Hawaii 193 (1st Cir. 1918); Murphey v. Ambassador East, 370 N.E.2d 124 (Ill. App. 5th Div. 1977); Barrett v. Bryant, 290 N.W.2d 917 (Iowa 1980); Comm. v. Scanlon, 400 N.E.2d 1265 (Mass. App. 1980); People v. Riemersma, 306 N.W.2d 340 (Mich. App. 1981); State v. Suschare, 595 S.W.2d 295 (Mo. App. 3rd Div. 1979); State v. Davison, 568 P.2d 159 (Mont. 1977); State v. Athorn, 216 A.2d 369 (N.J. 1966); People v. Brown, 423 NYS 2d 461 (N.Y. 1979); West v. State, 617 P.2d 1362 (Okla. 1980); Comm. v. Sero, 387 A.2d 63 (Penn. 1978); State v. Fuino, 608 S.W.2d 892 (Tenn. App. 1980); Berry v. State, 588 S.W.2d 932 (Tex. Cr. App. 1979); State v. Barrett, 320 A.2d 621 (Vt. 1974); Fuller v. Comm., 55

(footnote continued on next page)

(1950) noted: "[a] holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. . . . Preservation of the opportunity to show actual bias is a guarantee of defendant's right to an impartial jury." Id., at 171-172, 94 L.Ed. 734, 70 S. Ct. 519. The holding in *Remmer*, where a bribery approach was made, was that a hearing would be required to ". . . determine the circumstances, *the impact thereof upon the juror*, and whether or not [they were] prejudicial. . . ." 347 U.S. at 230, 98 L.Ed. 654, 74 S.Ct. 450, emphasis added. The considerable significance of this issue was emphasized again last term, when the allegation was that a juror was biased because of a pending employment application with the prosecution: "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. *Smith* v. *Phillips*, ___ U.S. ___, ___, 71 L.Ed. 2d 78, 85, 102 S.Ct. 940, 945 (1982). Further, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and *to determine the effect of such occurr-*

S.E. 2d 430 (Va. 1949); State v. Scotchel, 285 S.E.2d 384 (W.Va. 1981); Boyles v. People, 6 P.2d 7 (Colo. 1931). Statutes following establish a complete jury privilege: Ga. Code Ann. 17-9-41; Ky. Rev. Crim. Code § 10.04; La. R.S. 15:470. Cases following establish a complete jury privilege: Travis v. State, 397 So.2d 256 (Ala. App. 1981); Meyer v. State, 627 P.2d 636 (Alaska 1981); Watson v. State, 184 A.2d 780 (Del. 1962); State v. Scroggins, 433 P.2d 117 (Idaho 1967); Bryant v. State, 385 N.E.2d 415 (Ind. 1979); State v. Kelley, 357 A.2d 890 (Me. 1976); Turner v. State, 428 A.2d 88 (Md. App. 1981); Bunch v. Shaw, 355 So.2d 1382 (Miss. 1978); State v. Kehn, 361 N.E.2d 1330 (Ohio 1977); State v. Gardner, 371 P.2d 558 (Ore. 1962); Palmigiano v. State, 387 A.2d 1382 (R.I. 1978); State v. Smith, 234 S.E.2d 16 (S.C. 1977).

ences when they happen." Id., at ____, 71 L.Ed. 2d 86, 102 S.Ct. 946, emphasis supplied.

Recall that, crucial to the issue of guilt or innocence was expert testimony from both sides concerning conclusions to be drawn from blood spatter patterns at the crime scene, and the State's contention that some blood coagulated before it was spattered.

During the trial, the State argued that the most important evidence of appellant's guilt was the presence of two spots of allegedly coagulated blood on the front of appellant's shorts; coagulated spots on the front of his shorts would be inconsistent with appellant's defense. (App. 57a.) The jury experiment accordingly went to the heart of the case.

Poised against the state statute, R.S. 14:470, this case presents the substantial problem of determining the extent of the inquiry as to impact and effect: here the trial court conducted an evidentiary hearing and found that upon deliberation the jury was deadlocked; that thereafter one juror in the presence of four others conducted an experiment to establish the coagulation time of his blood; that the experiment was improper, went outside the record, corroborated the State's case; and that thereafter the jury voted to convict the defendant. Against a Sixth and Fourteenth Amendment challenge, the Louisiana Supreme Court expressly upheld utilization of the state's jury privilege statute to block completion of the record and demonstration of actual prejudice, *viz*, that the experimenting juror changed his vote immediately thereafter, becoming the tenth juror to convict in this minimum (10-to-2) verdict. No attempt was made to advance, nor do we here advance, a right to evaluate the juror's mental processes. The procedure prohibited by the lower court relates solely to documenting the objective fact of the

juror's vote change in relationship to the time of the experiment (App. 41a-44a), and the objection is that the fairness of the inquiry as to prejudice was inevitably compromised by the absence of this factual material.

A post-trial hearing was here convened to determine whether there was a reasonable possibility of prejudice arising from the consideration of extra-record evidence. Simply as a common sense proposition, several permutations suggest themselves in any analysis of impact and effect of extraneous influence:

(a) Extra-record evidence was considered and it corroborated the State's case. However, no juror changed his vote to guilty thereafter. On these facts the reasonable possibility of prejudice toward the defendant is lessened.

(b) Extra-record evidence was considered and it corroborated the defendant's case. A juror thereafter changed his vote to guilty. On these facts the reasonable possibility of prejudice toward the defendant is lessened.

(c) Extra-record evidence was considered and it corroborated the State's case. A juror changed his vote to guilty, breaking a deadlock and providing a conviction. It must be said on these facts that the reasonable possibility of prejudice toward the defendant is heightened.

(d) Extra-record evidence was considered. A juror changed his vote to not guilty. On these facts the reasonable possibility of prejudice toward the defendant is lessened.

As is apparent, in each of these four potential situations, the objective fact of a vote change is clearly essential to the prejudice inquiry. Hence, to arbitrarily exclude such evidence automatically by statute operates to deny an accused his rights under the Sixth and Fourteenth Amendments. The issue merits plenary review.

2. Non-Unanimous Verdict/No Discretion In Sentencing.

Did The Louisiana Supreme Court Err In Concluding That The Louisiana Non-Unanimous Jury Verdict Authorities (Louisiana Constitution Article 1, Section 17, Repeated In Code Of Criminal Procedure Article 782) And The Louisiana Mandatory Penalty Authority (R.S. 14:30.1) Are Not Violative Of The Sixth, Eighth And Fourteenth Amendments To The United States Constitution Even Though They Authorize A Non-Unanimous Verdict By A Twelve-Member Jury When There Is No Discretion In Sentencing, And The Penalty Upon Conviction is Necessarily Life Imprisonment Without Benefit Of Parole, Probation Or Suspension Of Sentence?

The Court has yet to decide a case in which a non-unanimous verdict by a twelve-member jury triggered a mandatory sentence of life imprisonment without benefit of parole, probation or suspension of sentence, and in which, accordingly, a convicted defendant in fact would spend the balance of his life incarcerated.[2]

The importance of this question has been well established over the last decade. State prisoners were denied relief from term-of-years sentencing flowing from non-unanimous verdicts by twelve-member juries in *Johnson* v. *Louisiana*, 406 U.S. 356, 32 L.Ed.2d 152, 95 S.Ct. 1620 (1972) and *Apodaca* v. *Oregon*, 406 U.S. 404, 32 L.Ed.2d 184, 92 S.Ct. 1928 (1972), where claims under the Fourteenth and Sixth Amendments to the United States Constitution were respectively rejected. That did not preclude unequivocal relief under the same authority, however, from non-unanimous verdicts by six-member

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[2] The authority of states to "fix mandatory, minimum sentences for noncapital crimes" was expressly not passed upon in *Lockett* v. *Ohio*, 438 U.S. 586, 606 at f.n. 13, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978). The matter *sub judice*, of course, does not involve a mandatory minimum, but rather the ultimate mandatory maximum short of death.

juries, *Burch* v. *Louisiana*, 441 U.S. 130, 60 L.Ed.2d 96, 99 S.Ct. 1623 (1979), a right of such consequence as to require retroactivity to cases then on appeal, *Brown* v. *Louisiana*, 447 U.S. 323, 65 L.Ed.2d 159, 100 S.Ct. 2214 (1980).

Although *Rummel* v. *Estelle*, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980) involved, and rejected, relief *via* a proportionality analysis under the Eighth and Fourteenth Amendments for a state recidivist serving a life sentence, the petitioner there enjoyed the possibility of parole, an entitlement absent here short of gubernatorial intervention on a subjective basis (App. 49a). (See applicable Louisiana Constitutional and statutory provisions cited at pp. 4, 5-7, ante.) Decisions subsequent to *Rummel* continue to point to the viability of the present inquiry, *Hutto* v. *Davis*, ___ U.S. ___, 70 L.Ed.2d 556, 102 S.Ct. 703 (1982) in particular announcing that the Court ". . . has never found a sentence for a term of years within the limits authorized by statute to be, *by itself*, a cruel and unusual punishment. . .", ___ U.S. at ___, 70 L.Ed.2d at 559, 102 S.Ct. at 704, emphasis supplied, and that ". . . we distinguished between punishments—such as the death penalty—which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration . . . there being no clear way to make 'any constitutional distinction between one term of years and a shorter or longer term of years.' ", ___ U.S. at ___, 70 L.Ed.2d at 559-560, 102 S.Ct. at 704, quoting *Rummel* v. *Estelle*, supra, 445 U.S. at 275, 63 L.Ed.2d at 382, 100 S.Ct. at 1133.

Recognizing that ". . . individual culpability is not always measured by the category of the crime committed . . .", *Furman* v. *Georgia*, 408 U.S. 238, 402, 33 L.Ed.2d 346, 443, 92 S. Ct. 2726, 2810 (1972) (Chief Justice Burger dissenting), we suggest that any mandatory sentencing

scheme is inherently suspect. The Court clearly recognized "the wide acceptance of individualization of sentences in noncapital cases," *Lockett* v. *Ohio*, 438 U.S. 586, 605, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), when it held that in capital cases the individualization requirement was essential under the Eighth and Fourteenth Amendments. The comparison was between an "executed capital sentence" as contrasted to "[a] variety of flexible techniques—probation, parole, work furloughs, to name a few—and various post-conviction remedies [which] may be available to modify an initial sentence of confinement in noncapital cases." Id. at 605, 57 L.Ed.2d 973, 98 S.Ct. 2954. The Louisiana legislation contemplates that in the mandatory life sentence under review there will be no probation, parole, suspension of sentence or post-conviction remedial modification; it enforces deterrence and isolation, it completely rejects rehabilitation. In short, the Louisiana scheme more closely approximates a capital sentence than it does a term of years. This necessarily raises the individualization of sentence to constitutional dimensions. The statute must yield to the Eighth and Fourteenth Amendment challenge.

Although either the non-unanimous verdict or the mandatory penalty is itself sufficient for relief, we paraphrase from *Burch*, supra, 441 U.S. at 137, 60 L.Ed.2d at 96, 99 S.Ct. at 1623, to demonstrate the significance of the question presented; the issue embodied in this case lies at the intersection of previous decisions concerning non-unanimous verdicts and mandatory penalties. To invoke a non-individualized sentence of this magnitude on the basis of a non-unanimous verdict is unwarranted and constitutionally infirm. The issue thus presents a unique opportunity to define the parameters of the holding in *Rummel* and the standard initiated by *Apodaca* and

Johnson, refined in *Burch* and *Brown*. It accordingly merits plenary review.

3. Circumstantial Evidence Rule As Affected By The Fourteenth Amendment And Jackson v. Virginia.

Under Louisiana R.S. 15:438, "The Rule As To Circumstantial Evidence Cases Is: Assuming Every Fact To Be Proved That The Evidence Tends To Prove, In Order To Convict, It Must Exclude Every Reasonable Hypothesis Of Innocence." Did The Louisiana Supreme Court Err In Holding That The Fourteenth Amendment To The United States Constitution As Announced In *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979), Is Not Applicable To An Affirmative Prosecutorial Duty As Set Forth In Louisiana R.S. 15:438?

The question presented raises the important issue of whether the protection of the Fourteenth Amendment to the United States Constitution as announced in *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979) requires the prosecution to exclude every reasonable hypothesis of innocence beyond a reasonable doubt when a state has legislatively adopted a circumstantial evidence rule.

In *Holland* v. *United States of America*, 348 U.S. 121, 99 L.Ed. 150, 75 S.Ct. 127 (1954), the Court expressly noted at page 139 the conflict in jurisprudential rules among lower federal courts as to a jury being instructed in circumstantial evidence cases that the government's evidence must be such as to exclude every reasonable hypothesis other than guilt. Recognizing the conflicting lower court applications, the Court held, ". . . the better rule is that . . . such an additional instruction on circumstantial evidence is confusing and incorrect." Id. at 139, 99 L.Ed.2d 150, 75 S.Ct. 127. The decision in *Holland*, however, preceded *Jackson*, and there was no occasion to address, nor did it address, the effect of specific state or

federal legislation establishing a circumstantial evidence rule. The *Jackson* Court cited *Holland* in dicta for the proposition that the prosecution was not under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt,[3] but Virginia had no circumstantial evidence legislation at issue in the case; thus the effect of an affirmative prosecutorial duty was not analyzed.

Following the *Jackson* decision the Louisiana Supreme Court formulated a single standard which recognized both the state's statutory circumstantial evidence rule as well as *Jackson's* impact upon it:

> "Therefore, when we review a conviction based [solely] upon circumstantial evidence we must determine that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that every hypothesis of innocence had been excluded." *State* v. *Austin*, 399 So.2d 158, 160 (La. 1981). (App. 6a.)

Retreating from this position in the instant case, the Louisiana Supreme Court now proposes to make the circumstantial evidence and *Jackson* inquiries independently of each other, thereby eliminating any effect which *Jackson* would have upon the former. (App. 6a.)

Our research indicates that numerous states have rules which, in varying terms, require that to convict under circumstantial evidence, the proof must satisfy the jury of the defendant's guilt and exclude every other reasonable hypothesis to a moral certainty or beyond a reasonable doubt.[4]

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[3] *Jackson* v. *Virginia*, supra, at 443 U.S. 326.

[4] 23 Corpus Juris Secundum, Criminal Law, § 907, pp. 576-77 at f.n. 58 (1962)

The problem is well illustrated here. In addition to Defendant's consistent hypothesis of innocence, some two weeks after his conviction defense counsel received a handwritten confession to Mrs. Graham's murder. (App. 59a-60a.) The Louisiana Supreme Court discounted the likelihood that the letter if introduced at trial would have changed the verdict. (The writer apparently had been hospitalized in a mental institution and disagreed with the verdict.) (App. 21a; 422 So.2d at 137.) However, that approach to the issue does not touch upon the *reasonableness* of the author's scenario, apart from his involvement, nor does it deal with whether the scenario was itself excluded beyond a reasonable doubt, or merely to the extent of some lesser standard. In the context of this appeal it is immaterial that the confession arise after conviction—what is important is that the Louisiana Appellate Court has fashioned a rule which excludes *Jackson* considerations from the multitude of reasonable hypotheses of innocence which may underly this and subsequent circumstantial evidence cases.

Thus, the present case specifically raises the substantial question of whether, under a statutory circumstantial evidence rule, a post-*Jackson* trier of fact can find that every element of the offense has been proved beyond a reasonable doubt unless every reasonable hypothesis of

innocence has been excluded to that same degree. Plenary review is accordingly required.

Respectfully submitted,

BURNETT, SUTTON, WALKER & CALLAWAY
(A Professional Law Corporation)
1400 Youree Drive
Shreveport, Louisiana 71101
Tel. (318) 221-3131

By: _____
BOBBY D. SUTTON
Counsel of Record

BURNETT, SUTTON, WALKER & CALLAWAY
(A Professional Law Corporation)
1400 Youree Drive
Shreveport, Louisiana 71101
Tel. (318) 221-3131

By: _____
GLENN E. WALKER
Of Counsel

CERTIFICATE

I hereby certify that I am a member of the bar of this Court and that appropriate copies of the above and foregoing Jurisdictional Statement, together with a copy of a Notice of Appeal, including the date of docketing and docket number hereof, has been served upon all parties required to be served herein, all in accordance with the Supreme Court Rules, by depositing same in the United States Mail with first class postage prepaid, addressed as follows:

(1) Hon. William J. Guste, Jr.
Attorney General, State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

(2) Barbara B. Rutledge
Assistant Attorney General, State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

(3) Paul J. Carmouche
District Attorney, Caddo Parish, Louisiana
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

(4) Dale G. Cox
Assistant District Attorney, Caddo Parish, Louisiana
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

Shreveport, Louisiana, this ____ day of February, 1983.

BOBBY D. SUTTON
Counsel of Record
For Appellant
Lewis T. Graham, Jr.

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APPENDIX A

The Louisiana Supreme Court's October 18, 1982, opinion.

SUPREME COURT OF LOUISIANA

No. 81-KA-3328

STATE OF LOUISIANA

v.

LEWIS T. GRAHAM, JR.

**APPEAL FROM THE FIRST JUDICIAL DISTRICT, PARISH OF CADDO,
HONORABLE C. J. BOLIN, JR., JUDGE.**

October 18, 1982

DENNIS, Justice.

On March 31, 1980, Kathleen Graham was beaten to death with a sledgehammer while she slept in the bedroom of her home in Shreveport. Living in the home at the time of Mrs. Graham's murder were her husband, Dr. Lewis T. Graham, Jr., who shared the master bedroom with her, and three minor children, who slept in nearby bedrooms.

About 5:00 a.m., Lewis T. Graham, Jr. called the Shreveport Police Department and advised them that intruders had broken into his home and severely injured his wife. Dr. Graham also called a neighbor across the street, who in turn called another neighbor. This second neighbor went immediately to the Graham home and found Lewis Graham in the front hallway. He saw liquor bottles scattered over the den floor. Also on the floor was a set of binoculars that had been removed from their case. Dr. Graham and the neighbor went to the rooms of each of the children and woke them from their sleep.

The police arrived a few minutes later, and an officer kicked down the locked door of the master bedroom and entered. He saw Kathleen Graham lying on her back on the left side of the bed. Her face was covered with blood. Also, blood was present on the ceiling, walls, bedspread and linen, and carpet. A sledgehammer and a knife lay on the floor on the left side of the bed. The carpet on the left side of the bed was stained with blood. Much blood was present on the right side of the bed itself. Lewis Graham had blood on the front and back of his tee-shirt and the front of his undershorts. The shower, tub, and lavatory in the master bedroom were wet and the lavatory contained blood.

The overhead garage door was found partially raised. The door leading from the garage to the kitchen was found pulled too, but not closed because the dead-bolt was extruded. Scuff marks appeared on the door facing. A crowbar was found on the garage floor. A can of coins and a flashlight were found on the driveway leading into the garage. The hammer, knife, crowbar, flashlight and coins all belonged to the Grahams.

Police officers found no sign of forced entry. Several neighbors of the Grahams had been home all night and heard nothing unusual. However, two neighbors stated that their dogs had awakened them during the night of the murder.

The coroner revealed the cause of Kathleen Graham's death to be blunt head trauma caused by an instrument consistent with the sledgehammer found in the bedroom. A forensic pathologist testified that Mrs. Graham had sustained at least four blows to the top of her head with a sledgehammer while she was lying on the right side of the bed as it would appear to a person standing at the foot. These blows were struck in rapid succession and rendered her unconscious and incapable of voluntary movement. She did not die immediately but lived for some fifteen to thirty minutes after the first blows. After she was beaten on the right side of the bed, Mrs. Graham was moved onto her back on the left side of the bed as viewed from its foot, where she received what the expert considered to be

the final blow, a massive blow to her forehead also delivered with the sledgehammer.

Lewis Graham was not seriously injured. He sustained the following wounds: an abrasion on his forehead; a cut across the entire palm of his left hand which required no treatment; and an incision type wound on the flank underneath his left arm which required one stitch.

On the morning of the murder, Lewis Graham recounted the following version of facts to the Shreveport police:

> His wife woke him between 2 and 3 a.m. hearing noises. Dr. Graham checked in several rooms of the house but found all the doors closed and nothing unusual. He returned to the bedroom and set his alarm clock for a time close to 5 a.m. so that he could study. He placed the clock on the floor. He got into the left side of the bed and fell into a deep sleep. He next remembers the bed lurching or shaking. He heard a scream and was pushed or pulled from the bed. He felt more than one person was handling him and felt a sharp pain under his left arm. A brief struggle took place. He was then thrown across the room where he fell on his stomach and lay unconscious. He was unable to describe anything about his assailant(s), although he felt that there were probably two of them.
>
> When Dr. Graham awoke he was on his stomach. He turned on the bedroom light and saw a horrible scene, knowing immediately his wife was probably dead. He went to the bathroom to see how badly he had been hurt. He noticed the blood on his shirt. He then turned the bedroom light off and locked the master bedroom door so that his children would not see this horrible scene. He proceeded to the kitchen where he looked up the number of the Shreveport Police, called them and then a neighbor, Mrs. Goodwin. She in turn called another neighbor, Mr. Siragusa. Dr. Graham put on his pants which were located in the family room, turned on the porch light and waited for the police to arrive. Mr. Siragusa arrived before the police and they, Dr. Graham and his neighbor, then checked on the children. He sent the children across the street. He noticed some cabinet doors opened in the den and liquor bottles strewn on the den floor.

On several subsequent occasions, including during his testimony at trial, Dr. Graham related his version of the events surrounding his wife's death which, except for a few inconsistencies, substantially tracked this first statement.

The Northwest Criminalistics Laboratory performed certain tests on physical evidence seized from the Graham residence. The tests revealed the following: Kathleen Graham had blood type "A"; Lewis T. Graham, Jr., had blood type "O"; the sledgehammer was determined to have type "A" on it; the knife was determined to have type "O"; the blood on the bed linens was of type "A". The stain under the left arm of the defendant's tee-shirt was type "O"; the spatters on the front of the tee-shirt was type "O"; the spatters on the front of the tee-shirt and the drips on the back and front of the right shoulder were type "A". The spatters on the defendant's undershorts were type "A". They concluded that the blood spattering the headboard of the bed, the lamp, the clock and various places was all human blood. Shreveport police identification personnel discovered a latent fingerprint impression on the handle of the knife which was matched to the defendant.

Mr. Herbert McDonnell, the state's blood spatter expert, examined the tee-shirt of the defendant and concluded that the stains on the front and back on the right shoulder of the shirt were consistent with the type of cast-off spatter found on the shirt of a person who has administered a beating with an object similar to a sledgehammer. He considered that the size and concentration of the blood stains on the front of the defendant's tee-shirt indicated that the defendant was within two to four feet of the victim at the time she was beaten. He identified what he considered to be wipe marks down the left side of the defendant's tee-shirt. Mr. McDonnell found blood which had coagulated before it was scattered by the sledgehammer's blow on the lamp and headboard of the bed and on the front of the defendant's undershorts. He testified that human blood coagulates in three to five minutes which would mean that a time period of three to five minutes elapsed between the two

beatings of Mrs. Graham. Mr. McDonnell determined from the size and concentration of the blood spatters on the front of the defendant's undershorts that the defendant was within two to four feet of the victim when the last beating was administered.

Mrs. Judith Bunker, the defendant's blood spatter expert, testified that the spots on the front of the defendant's clothing could have been minute particles of tissue. She further testified that she was unsure as to the coagulation time of blood, but that she would agree with whatever coagulation time was given by Mr. McDonnell, with whom she was acquainted. In a separate context, relating to the amount of blood lost by the defendant, Dr. Petty, a forensic pathologist, testified that coagulation times vary with individuals.

Defendant, Dr. Lewis T. Graham, Jr., was charged by indictment with the second degree murder of his wife. A Caddo Parish jury convicted the defendant as charged by a vote of 10-2 and the trial judge sentenced him to life imprisonment. He moved for a new trial on several grounds and for a motion in arrest of judgment, but the trial judge overruled all of his motions. In this appeal, the defendant makes fourteen assignments of error. Because we find that each of his assignments is without merit, we affirm the defendant's conviction and sentence.

1. Sufficiency Of Evidence (Assignment No. Seven)

Defendant contends that the evidence is constitutionally insufficient to support his conviction because all of the evidence was circumstantial as to his identity as the killer and did not exclude every reasonable hypothesis of his innocence. We conclude that this assignment is without merit. The hypothesis of innocence advanced by the defendant is not a reasonable one.

The Due Process Clause of the Fourteenth Amendment requires this court to review the evidence upon which a criminal conviction is based to determine whether it is minimally sufficient. A defendant has not been afforded due process, and his conviction cannot stand, unless, viewing the evidence in the

light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979). Additionally, we are governed by our statutory rule as to circumstantial evidence: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude very reasonable hypothesis of innocence. R.S. 15:438.

In previous opinions we have attempted to formulate a single precept incorporating both standards. See, e.g., State v. Austin, 399 So.2d 158 (La. 1981). ("Therefore, when we review a conviction based upon circumstantial evidence we must determine that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded." *Id.* p. 160). Upon further reflection, however, a merger does not appear to promote clarity but could lead to a distortion of the standards. A combination of the rules may incorrectly imply that, when all of the evidence of the defendant's guilt is circumstantial, due process requires more than evidence which would satisfy any rational juror of proof of guilt beyond a reasonable doubt. On the other hand, an in-tandem articulation may seem improperly to diminish the requirement of the circumstantial evidence rule by implying that, in a close case, this court will defer to the jury's finding rather than follow its own determination of whether there is a reasonable hypothesis of innocence. Although in many instances separate and dual applications of the rules will yield the same result, out of an abundance of caution we will proceed to apply each standard separately, as it was given to us by the framers.

The characterization of evidence as "direct" or "circumstantial" points to the kind of inference which is sought to be drawn from the evidence to the truth of the proposition for which it is offered. If the inference sought is merely that certain facts are true because a witness reported his observation and the assumption that witnesses are worthy of belief, the evidence is

direct. When, however, the evidence is offered also for some further proposition based upon some inference other than merely the inference from assertion to the truth of the fact asserted, then the evidence is circumstantial evidence of this further fact-to-be-inferred. McCormick, § 185 p. 435. In the present case, although direct evidence was introduced to prove that the victim was murdered in her bed with a sledgehammer while the defendant was present, it qualifies only as circumstantial evidence of the crucial fact-to-be-inferred, i.e., that the defendant was the killer.

One hypothesis of innocence is suggested by defendant's arguments and testimony: Two or more intruders entered the Graham house on the night in question without awakening the Grahams or their three children, escaping the attention of the Graham's dog, and leaving only questionable signs of forcible entry. They picked up a sledgehammer and a knife in the house and proceeded to the main bedroom where the Grahams were sleeping. One or more of the intruders seized the defendant while another beat his wife's head with a sledgehammer. At this time, the front of the defendant's tee-shirt and shorts were spattered with his wife's blood. During a brief struggle, the defendant received a small-stitch wound from the knife, and was rendered unconscious when he was thrown against a wall. The intruders decided not to molest him anymore but continued to savagely beat his wife's head. Because the defendant came to rest face down he received blood spatters on the back of his tee-shirt and shorts in addition to that on the front. During or after the sledgehammer murder one or more of the intruders took a can of coins which defendant said contained $150 in dimes, but later the can was discarded in front of the house. They also scattered some bottles of liquor across the den floor and tampered with a set of binoculars. The murderers overlooked or were not interested in several items of value such as Mrs. Graham's diamond ring and an antique pistol. They departed without being seen by anyone, even the defendant who was unable to describe them, without disturbing or awakening any of the three children, and again without being detected by the family dog.

We do not think this is a reasonable interpretation of the situation, assuming every fact to be proved that the evidence tends to prove. The odds are heavily against the coincidence of the series of unlikely events upon which the hypothesis depends. The possibility that the murder occurred in this way is reduced further by the facts inconsistent with defendant's theory which the evidence also tends to prove. In comparison with the prosecution's hypothesis of defendant's guilt, which is consistent overall with the evidence, the defendant's circumstantial theory of innocence is remote.

Severally, the events of the defendant's hypothesis are each unlikely: A forcible yet silent, almost traceless entry by two unidentified and undescribed intruders; a heinous sledgehammer murder of a woman in her sleep by selective killers who had little malice toward her husband and none toward her children; a fortuitous manipulation of defendant's torso during the slaying that gave him the bloody coating of a murderer; a highly selective burglary by criminals who preferred dimes to other more precious valuables; a trackless disappearance of villains seen only by defendant, who silently, efficiently committed their bizzare crime with implements they discovered at the house and left no clues to their identities behind. The odds against *all* of these events taking place in one criminal transaction are extremely high.

The hypothesis of defendant's innocence conflicts with several of the facts which the evidence tends to show. According to the state's expert witness, the cast off blood stains on defendant's shoulders were not consistent with his asserted facedown reclining position but were consistent with his guilt. The same expert's testimony tends to prove that there was coagulated blood on the front of defendant's underclothes which could not have been obtained consistently with defendant's story but which was consistent with his guilt.

There was many other details which were more fully consistent with the prosecution's theory than with a hypothesis of innocence. The blood spatters on defendant's shorts were denser than those on his tee shirt, indicating a greater likelihood

that he was standing when the spatters occurred. The blood spatters on both front and back of defendant's clothes were totally consistent with his role as the murderer. According to the state's experts no one's fingerprints but the defendant's were found on the knife. Although defendant claims he was cut with the knife before being thrown faced down there was no blood at the place he said he landed. There were transfer patterns on defendant's tee-shirt consistent with the wiping of blood from an instrument such as a knife, although it could not be said conclusively that it was caused by the knife in the instant case.

Consequently, we conclude that, assuming every fact that the evidence tends to prove, the evidence excludes every reasonable hypothesis of innocence. For all of the reasons expressed, we further conclude that defendant was not denied due process of law and that this conviction is clearly based upon evidence from which, when viewed in the light most favorable to the prosecution, a rational juror could find that the essential elements of defendant's crime had been proved beyond a reasonable doubt. Thus, the evidence is both constitutionally and statutorially sufficient to support the defendant's conviction.

2. Jury Experiment (Assignment No. One)

Defendant contends that the trial court committed reversible error in denying his motion for a new trial base upon an independent blood coagulation experiment by several jurors during their deliberations. We conclude that this assignment is without reversible merit because there is not a reasonable possibility that the juror's experiment affected the verdict.

According to evidence educed by the defendant, after the case had been submitted to the jury one of the jurors, in the presence of four others, pricked his finger and determined that it took four and one-half minutes for his blood to coagulate. The experiment occurred at about 1:30 a.m. in a hotel room where the five jurors had continued to discuss the case after earlier jury deliberations from 5:20 p.m. to about 12:00 p.m. had ended

without a verdict. The next morning, which was Sunday, the jury began deliberations shortly after 8:15 a.m. and by 9:00 a.m. reached a verdict of guilty by a 10-2 vote.

Our law provides that the jury shall be sequestered during its deliberations, after the judge delivers the charge, so as to be secluded from outside communications. La.C.Cr.P. art. 791. The purpose of sequestering jurors is to protect them from outside influence and from basing their verdict upon anything other than the evidence developed at trial. State v. Marchand 362 So.2d 1090 (La. 1978); State v. Hunter, 340 So.2d 226 (La. 1976); Turner v. Louisiana 379 U.S. 466, 85 S.Ct. 546, 12 L.Ed 2d 424 (1965). See also C.Cr.P. at 793 (relative to the use of evidence in the jury room).

Accordingly, a juror who considers evidence not developed or admitted at trial violates his sworn duty and may be guilty of misconduct. Under our statutory law, however, no juror is competent to testify to his own or his fellows' misconduct or to give evidence to explain, qualify, or impeach any indictment or any verdict found by the body of which he is or was a member. R.S. 15:470. Nevertheless, it is now clear that the statute must yield and that our courts are required to take evidence upon well pleaded allegations of prejudicial juror misconduct violating an accused's constitutional right to due process, to confront and cross-examine witnesses or to a trial by a fair and impartial jury and to set aside the verdict and order a new trial upon a showing that a constitutional violation occurred and that a reasonable possibility or prejudice exists.[1] Durr v. Cook 589 F.2d 891 (5th Cir. 1979), vacating State v. Durr 343 So.2d 1004 (La. 1977). Because the accused is not required to show actual prejudice, the state may legitimately invoke the prohibition of

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[1] This rule is to be distinguished from the related precept which provides that in a criminal case, any unauthorized communication by a *non-juror* during trial or deliberation about the matter pending before him is deemed presumptively prejudicial. State v. Wisham 371 So.2d 1151 (La. 1979); State v. Marchand 362 So.2d 1090 (La. 1978).]

R.S. 15:470 to bar inquiry into the mental processes of an individual juror. Cf. State v. Wisham, *supra;* State v. Marchand, *supra;* State v. Abney 347 So.2d 498 (La. 1977).

In the present case, the trial judge correctly followed the law at the new trial motion hearing by taking evidence upon the allegations of unconstitutional and prejudicial juror misconduct. He also correctly excluded any evidence of actual effect or prejudice upon the jury deliberations. Finally, he ruled correctly in our opinion that it had not been shown that a reasonable possibility of prejudice existed.

The problems presented by an experiment conducted by jurors on their own defy precise, systematic analysis. A juror is expected to draw upon his general knowledge and experience in deciding the case, and he is encouraged to participate in full and robust debate and deliberations with his fellows in reaching a verdict. However, he should not consider facts relating to the case unless introduced at trial under constitutional and legal safeguards. State v. Sinegal, 393 So.2d 684 (1981). Accordingly, when a juror passes beyond the record evidence in reaching a decision, whether a new trial will be granted depends upon the magnitude of the juror's deviation from his proper role, the degree to which the accused was deprived of the benefits of the constitutional and statutory safeguards, and the likelihood that the impropriety influenced the jury's verdict. All of these elements must be weighed in determining whether there is a resonable possibility that the defendant's right to a fair trial has been prejudiced.

The jurors' experiment in the present case does not represent a radical departure from our expectations that a juror will employ his own ordinary experience in the deliberations. Any normal human being will experience his share of childhood scrapes, razor nicks, blood test pricks and various other episodes producing practical knowledge of blood coagulation. To say that a juror could not pass a fraction of an inch beyond the record to recall and employ this type of practical knowledge in his deliberations is to ignore centuries of history and the true

function of the jury. Cf. United States ex rel Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), cert. denied 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed. 2d 646. Although the juror's experiment in this case cannot be classified as proper conduct, it was performed within the jury room and dealt with a subject well within the experience and practical knowledge of all jurors. As contrasted with other cases, it did not involve jurors conducting tests of matters beyond their normal ken or going outside the jury room to obtain esoteric knowledge or special information pertaining directly to the case. See e.g. State v. Sinegal, *supra*, Durr v. Cook, *supra*. Consequently, the danger that the juror's common sense would be overcome by the experiment's instructive or dramatic effect was well tempered by an average juror's practical experience with blood coagulation.

The jurors' timing of blood clots on a pricked finger did not deprive the defendant of the benefits of constitutional and legal safeguards to the same extent as other tests described in reported decisions. The experiment here did not depend heavily on the jurors' powers of observation or on the reliability and credibility of a juror's report upon phenomena observed outside the jury room. Cf. Durr v. Cook, *supra*. Consequently, the loss of an opportunity to confront and cross-examination those who conducted the experiment was not as potentially prejudicial to the defendent. Furthermore, the rules of evidence would not necessarily have barred the introduction of the blood clot test evidence in this case. Demonstrative evidence offered for its circumstantial value may be admitted within a broad discretionary power of the trial court to weigh the probative value of the evidence against whatever prejudice, confusion, surprise and waste of time are entailed. McCormick § 212, p. 527. Consequently, the practical benefits the defendant lost because he was not able to assert his constitutional and legal rights at trial with respect to the experimental evidence were not of crucial magnitude in this case.

The juror's experiment tends to corroborate the prosecution expert witness' opinion that human blood coagulates in three to five minutes. In our opinion, however, there is not a reasonable

possibility that the juror's experiment contributed decisively to the guilty verdict. In a different context another type of experiment could prevent a jury from recognizing a reasonable doubt or a reasonable hypothesis of innocence presented by the evidence. In the present case, however, there is no reasonable hypothesis of innocence and the evidence clearly supports a finding of guilt beyond a reasonable doubt even without the state's theory involving blood coagulation time. Moreover, the experiment in this case, when viewed in the context of the evidence presented a trial and the ordinary experience most persons have had with blood coagulation, does not appear to be so persuasive or dramatic as to skew the judgment of the jury or cause it to disregard the evidence presented at trial.

During the trial, Mr. McDonnell testified that human blood coagulates within three to five minutes. Based on this and his opinion that some of the blood on the defendant's clothes had coagulated before it was spattered on defendant, this expert witness expressed the opinion that defendant could not have received the blood spatters in the manner in which the defendant described the events surrounding the murder.

However, Mr. McDonnell admitted he had not tested the spots on the defendant's clothes to make certain they were from pre-coagulated blood. Mrs. Bunker cast doubt on his theory when she testified that the spatters could have been caused by particles of the victim's flesh mixed with blood which coagulates more rapidly than pure blood. Dr. Petty in giving testimony in relation to the coagulation of *defendant's* blood stated that the coagulation time of human blood varies with the circumstances of case and the individual. On the other hand, there is even less blood coagulation evidence supporting the defendant's hypothesis of innocence. There was no affirmative evidence at trial whatsoever to the effect that the victim's blood could have coagulated with the rapidity necessary to fit within the defendant's account of the crime events.

When we weigh all of the evidence pointing toward defendant's guilt against the defense's unlikely hypothesis of in-

nocence, including defendant's unusual story of how he got his wife's blood spattered on both the front and back of his underclothes, all of the evidence concerning blood coagulation time recedes in importance. Ultimately, the blood coagulation theory is not essential to the state's case. Furthermore, the juror experiment added virtually nothing to the theory. At most, it was cumulative to Mr. McDonnell's opinion about blood coagulation time. Since his opinion was not disputed at trial, the corroborative effect of the experiment was slight. We do not think Dr. Petty's testimony disputed the McDonnell opinion. He said that coagulation times can vary, but he was not asked about the three to five minute period as an average or normal time. Mr. McDonnell said that coagulation time for human blood is three to five minutes, but he was not asked if this interval could vary under any circumstances. In short, there was at most only a possible area of conflict between the two experts which was not explored or drawn into focus. On top of this, the whole foundation of McDonnell's coagulation theory was called into question by Bunker's testimony that defendant's clothes did not have precoagulated spatters and McDonnell's admission that he couldn't be positive that they did. In essence, the jury experiment was cumulative to a part of a state expert's testimony which was not disputed at trial and which was not essential to a prosecution case that excluded every reasonable hypothesis of innocence and formed the basis for a rational finding of guilt beyond a reasonable doubt.

3. Baillif's Remark To Juror (Assignment No. 2)

Defendant contends that an unauthorized communication to the jury by its bailiff requires reversal because it was prejudicial to the accused. Midway through the trial, a bailiff told a juror that it would be up to the judge how long the jury would deliberate and it could by anywhere from five minutes to five days. An unauthorized communication to the jury by the bailiff requires reversal of the verdict, if the communication is prejudicial to the accused. State v. Marchand 362 So.2d 1090 (La. 1978). Such a communication during trial is presumed prejudi-

cial if it is about the matter pending before the court, *Id.*, but here the matter was not about the case itself and thus the burden was on the defendant to prove that the incident was prejudicial. The trial judge ruled that the defendant had failed to carry this burden because the jurors were apprised during voir dire that the trial would be an extended one and were questioned at length on how this would affect their personal situations. The trial judge's impression was that the remark was harmless. It appears that the remark was offhand and casual, although somewhat careless. Its impact, if any, was lessened by the fact that it occurred several days before deliberations began. It was not totally inaccurate, since the deliberation time of the jury would have fallen within the range given. The trial judge was there; he saw and heard the witnesses. Our review convinces us that his judgment was reasonable. Accordingly, we find that this assignment lacks merit.

4. Alternate Juror Participation (Assignment No. Three)

Defendant contends that a prejudicial unauthorized communication occurred when an alternate juror expressed his interpretation of evidence presented at trial to a principal juror. This assignment is without merit. The episode occurred during trial before the alternate had been discharged. As we indicated in discussing juror experiments, a juror's duty to refrain from receiving evidence or communications not developed or admitted at trial serves the same purpose as sequestration, to protect him from outside influence and from basing his verdict on anything other than the evidence developed at trial. Consequently, under the circumstances, the jurors did not violate their duty. During the trial, an alternate juror has the same functions, powers, facilities, and privileges as the principal jurors. C.Cr.P. art. 789. Consequently, his communication to a principal juror before his discharge is not an outside influence, and the trial judge correctly refused to allow the jurors to testify regarding this subject pursuant to R.S. 15:470 because the allegations of misconduct did not state a cause to believe any improper or prejudicial event had occurred.

5. Subpoena Duces Tecum (Assignment No. 4)

By this assignment of error, the defendant asserts that the trial court erred in quashing his subpoena duces tecum which requested that the state produce:

> A copy of all offense reports, memoranda, or letters of citizen's complaints, and any and every other writing, communication and/or records of any and every residential and/or commercial or business burglary or attempted burglary or unlawful entry to such pemises, including entry for purposes of rape, vandalism, theft, or any other purpose occurring between the dates of January 1, 1978 and March 31, 1980, within the area bounded by Live Oak Drive on the North, Kingston Road on the South and Mansfield Road on the West, Shreveport, Louisiana.

The state objected that the subpoena was unreasonably burdensome and oppressive. The state also asserted that the requested records might affect pending litigation, reveal the identification of confidential informants, contain records of unfinished convictions and the arrest records of defendants and status offenders. The trial court quashed the subpoena but ordered the state to file into the record a monthly summary of burglaries for the police district in which defendant's home was located for the period requested by the defendant. The defendant objected, stating that he also wanted the burglary offense reports and statistics on other crimes that were listed in his subpoena.

Although the defendant was indicted on July 15, 1980, the Shreveport Police Department was not served with the subpoena until July 6, 1981 or approximately one week before the trial began on July 13. Two police officers testified at the hearing on the motion to quash that to comply with the subpoena would require approximately ninety days. One of the officers estimated that the cost of a manual search for the information would require $10,000.00 in overtime pay.

The defendant has a constitutionally guaranteed right to compulsory process. La. Const. art. I, sec. 16. However, the very statute upon which the defendant relies for his subpoena

provides that "the court shall vacate or modify the subpoena if it is unreasonable or oppressive." La.C.Cr.P. 732.

In the present case, the subpoena was served upon the police department only one week before the scheduled trial. To accumulate the subpoenaed material would have taken almost three months and cost several thousand dollars. Given these facts, we do not believe that the trial judge committed reversible error when he quashed the subpoena as unreasonable and in its stead ordered the police to provide the defendant with a monthly summary of burglaries for the police district in which the defendant's home is located.

Therefore, this assignment of error lacks merit.

6. Constitutional Attacks (Assignments No. Five and Six)

By this assignment of error, the defendant contends that the mandatory imposition of a sentence of life imprisonment at hard labor without benefit of probation, parole or suspension of sentence for second degree murder constitutes cruel and unusual punishment in violation of La. Const. art. I, § 20 (1974) and the Eighth and Fourteenth Amendments of the United States Constitution. We have rejected this argument consistently. See, e.g. State v. Landry, 388 So.2d 699, 706 (La. 1980); State v. Brooks, 350 So.2d 1174 (La. 1977).

The defendant also asserts that the mandatory sentence unconstitutionally denies the defendant the right to have the trial court exercise its discretion in imposing sentences under La. C.Cr.P. arts. 893 and 894.1. However, we have recognized that the decision to assess mandatory life sentences for certain felonies is within the prerogative of the legislature. State v. Prestridge, 399 S.2d 564, 582 (La. 1981).

The defendant further contends that the use of the non-unanimous verdict violates the Sixth and Fourteenth Amendments and Louisiana Constitution article I, § 16 (1974). We recently rejected such an argument in State v. Belgard, 410 So.2d 720, 727 (La. 1982). In doing so, we expressly followed

decisions of the United States Supreme Court in its approval of the non-unanimous verdict in certain cases. See Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); Apodaca v. Oregon, 406 U.S. 404, 32 L.Ed.2d 184 (1972).

Accordingly, these assignments of error lack merit.

7. Jurors' Religious Services (Assignment No. 8)

By this assignment of error, defendant contends that the trial court erred in not allowing him to question two jurors regarding daily prayer services held by the jury foreman (who was a Presbyterian minister) for the jurors and the possible effect of such religious services upon the jury's deliberations.

The policy behind our "jury privilege" statute, R.S. 15:470, is to preserve the confidentiality of the deliberation among jurors and to add to the finality of jury verdicts. State v. Wisham, 384 So.2d 385, 387 (La. 1980). The privilege is not absolute and we have recognized that it must yield to a substantial showing that the defendant was deprived of his constitutional rights. State v. Sinegal, *supra*. Durr v. Cook, *supra*.

Defendant asserts that he was tried while the jury was charged with religious fervor. However, the record as limited by the trial court's application of the jury privilege does not support his contentions. Religious services among jurors do not amount to a substantial deprivation of constitutional rights necessary to overcome the prohibition against juror testimony. Voir dire is an opportune time to examine any religious attitudes which might adversely affect the defendant.

Accordingly, this assignment lacks merit.

8. Juror Prejudice (Assignment No. Nine)

By this assignment of error, the defendant contends that the trial court erred in denying his motion for new trial based on the allegation that one of the jurors, Barney Burks, had a preconceived and unalterable opinion regarding defendant's guilt.

Specifically, the defendant alleges that the Juror Burks, when asked before voir dire why he did not claim his age exemption from jury duty, responded, "[Y]ou don't want to see that man [the accused] go free, do you?" It is also alleged that after the verdict of guilty, Burks told a newspaper reporter that "he was determined not to let Graham go free. . . ." Finally, the defendant asserts that his defense was prejudiced by Mr. Burks' failure to reveal the fact that his daughter had committed suicide while her husband was at home with her and that he, Mr. Burks, attributed her emotional state and her death to her husband.

The trial judge ruled that Mr. Burks did not have a preconceived opinion. Mr. Burks testified at the hearing that he did not make either statement. The trial judge noted that Mr. Burks had been thoroughly questioned during voir dire for approximately an hour. Mr. Burks had testified that he would base his decision only on the evidence presented at trial. He testified that he agreed with the presumption of innocence and the burden of proof being on the state to prove guilt beyond a reasonable doubt. The trial judge observed that at least two other jurors should have heard the first statement, made before voir dire, and these witnessses did not testify at the hearing on the motion. The judge declared that the post-trial statement merely indicated that Mr. Burks was determined not to let the guilty defendant go free in light of all the evidence against him. On the issue of the deceased daughter, the trial judge noted that Mr. Burks was never questioned concerning any deceased children he might have. Thus, the failure of the prospective juror to reveal something which was not asked about did not amount to an effort to deceive the defendant.

We will reverse a trial judge's denial of a motion for a new trial only when that denial is an abuse of discretion. State v. Molinaro, 400 So.2d 596 (La. 1981). In the present case, the trial judge was faced with conflicting testimony between Mr. Burks and several witnesses. The trial judge indicated doubts regarding whether the first statement occurred and offered a reasonable, constitutionally sound interpretation for the

second statement. Additionally, the trial judge was convinced that the failure of Mr. Burks to declare that he had a deceased daughter was not a deception by Mr. Burks. We cannot say that the conclusions of the trial judge on this issue were incorrect.

Accordingly, this assignment of error lacks merit.

9. Cumulative Effect Of Assigned Errors (Assignments No. Ten and Eleven)

By assignment of error number ten, the defendant contends that the trial court erred in denying his motion for a new trial based on the grounds set forth in previous assignments, specifically, numbers 1, 2, 3, 8, and 12. The only additional argument presented is that the combined effect of those assignments violated the defendant's right to a jury trial and traditio al notions of fair play and due process.

By assignment of error number 11, defendant contends that the trial court erred in overruling defendant's motion for arrest on the grounds that the non-unanimous verdict and mandatory sentencing scheme are unconstitutional.

We previously addressed and rejected each of these contentions. Therefore, we will not discuss the merits of each assignment further. Furthermore, the combined effect of the incidences complained of, none of which amounts to reversible error, did not deprive the defendant of his right to a fair trial.

Accordingly, these assignments lack merit.

10. Newly Discovered Evidence (Assignment No. Twelve)

By this assignment, the defendant asserts that the trial court erred in denying his motion for new trial based upon newly discovered evidence. Some two weeks after the conclusion of defendant's trial, defense counsel received a handwritten letter which purports to be a confession to the murder of Kathleen Graham.

The Code of Criminal Procedure, art. 851 (3) provides for a new trial whenever:

> New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence has been introduced at the trial it would probably have changed the verdict or judgment of guilty.

The ruling on a motion for a new trial is committed to the sound discretion of the trial judge and will be disturbed on appeal only when there is a clear showing of an abuse of that discretion. State v. Spell, 399 So.2d 551 (La. 1981); State v. Manning, 386 So.2d 54 (La. 1980).

At a hearing on the motion for a new trial, it was shown that the alleged writer of the letter did not agree with the way the trial was going, suggested to a co-worker that the co-worker write an anonymous letter, and admitted that he had been hospitalized in a mental institution.

Considering the foregoing dubious circumstances behind the writing of the letter, it is highly unlikely that if the letter had been introduced at the trial it would have changed the verdict of guilty. Thus, the trial judge did not abuse his discretion when he denied the motion for a new trial.

Therefore, this assignment of error lacks merit.

11. Autopsy Photos (Assignment No. Thirteen)

By this assignment of error, the defendant asserts that the trial court erred in denying his motion for production of autopsy photographs of the victim as part of the coroner's proces verbal prepared pursuant to La. R.S. 33:1565. The trial court ruled that the photographs were not part of the proces verbal but that the defendant could utilize the criminal discovery articles to obtain the photographs. The defendant objected to the use of the discovery scheme and argued that forcing him to file a discovery motion caused him to be exposed to discovery reciprocity under C.Cr.P. art. 724 and accordingly forced him to surrender evidence to the state in violation of his Fifth Amendment rights.

Under our law a proces verbal refers to a written summary or report of facts. See, e.g. C.C.P. 2890. Thus, the trial judge was correct when he refused to hold the photographs as part of the coroner's proces.

However, the defendant argues that this application of our law to his situation deprived him of his Fifth Amendment rights against self-incrimination. The Fifth Amendment privilege against self-incrimination applies only to evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1965). The limited reciprocal discovery rights given the state when the defendant invokes discovery provisions allows the state access to only evidence of a non-testimonial nature. See C.Cr.P. 724. Thus, the defendant's Fifth Amendment rights were not violated.

In the present case, the defendant received the actual report of the coroner, without photographs. To that extent, he received a benefit inasmuch as he was entitled to only the proces verbal.

In light of these facts, we conclude that the trial judge did not err when he ruled that the defendant could not have access to the autopsy photographs as part of the proces verbal.

Accordingly, this assignment of error lacks merit.

12. Constitutional Attack On Jury Shield Law (Assignment Number Fourteen)

By this assignment, defendant contends that La. R.S. 15:470, our jury privilege statute, is unconstitutional.

The Louisiana rule as embodied in La. R.S. 15:470 follows the general rule that "a juror's testimony or affidavit is not receivable to impeach his own verdict." 8 Wigmore, Evidence § 2345 (McNaughton ed. 1961).

In recent times, we have come to realize that the absolute language of the statute cannot be applied so as to deprive a criminal defendant of his constitutional rights. For example, in

State v. Sinegal, *supra*, we reasoned that if the defendant presented a substantial claim that his constitutional rights had been infringed, the jury privilege cannot be used to bar testimony by jurors regarding their alleged improprieties. Our application of the jury privilege statute in this manner aligns with the Fifth Circuit's construction of the same statute. See Durr v. Cook, 589 F.2d 891 at 893-94. Moreover, this approach of looking behind an evidentiary privilege has been virtually mandated by the United States Supreme Court. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

As construed in this case and other decisions by this court, the statute is constitutional.

Accordingly, this assignment lacks merit.

For the reasons assigned, the defendant's conviction and sentence are affirmed.

AFFIRMED.

APPENDIX B

The Louisiana Supreme Court's December 10, 1982, denial of rehearing

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE — NEWS RELEASE #137

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On December 10, 1982, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the case listed below:

REHEARING DENIED:

81-KA-3328 State v. Lewis T. Graham, Jr.

APPENDIX C

Notice of appeal, filed February 1, 1983

SUPREME COURT OF LOUISIANA

NUMBER: 81-KA-3328

STATE OF LOUISIANA

versus

LEWIS T. GRAHAM, JR.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

PLEASE TAKE NOTICE that an appeal in this matter from the October 18, 1982 ruling, rehearing denied December 10, 1982, will be filed with the Supreme Court of the United States of America, to be docketed there as "Lewis T. Graham vs. the State of Louisiana;" and that same is done pursuant to 28 U.S.C. 1257(2) and other relevant law.

BURNETT, SUTTON, WALKER & CALLAWAY
1400 Youree Drive
Shreveport, Louisiana 71101
Tel. (318) 221-3131

/s/ By: Bobby D. Sutton
BOBBY D. SUTTON
Counsel of Record

/s/ By: Glenn E. Walker
GLENN E. WALKER
Of Counsel

CLERK'S OFFICE
SUPREME COURT OF LOUISIANA
FILED FEB 1 1983
CLERK

CERTIFICATE

I hereby certify that I am a member of the bar of this Court and that appropriate copies of the above and foregoing Notice of Appeal, have been served upon all parties required to be served herein, all in accordance with the United States Supreme Court Rules, by depositing same in the United States Mail with first class postage prepaid, addressed as follows:

(1) Hon. William J. Guste, Jr.
Attorney General, State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

(2) Barbara B. Rutledge
Assistant Attorney General, State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

(3) Paul J. Carmouche
District Attorney, Caddo Parish, Louisiana
501 Caddo Parrish Courthouse
Shreveport, Louisiana 71101

(4) Dale G. Cox
Assistant District Attorney, Caddo Parish, Louisiana
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

(5) Hon. Orie Hunter
Clerk of Court
First Judicial District Court
Caddo Parish Courthouse
Shreveport, Louisiana 71101

Shreveport, Louisiana, this 31 day of January, 1983.

/s/ Bobby D. Sutton
BOBBY D. SUTTON
Counsel of Record
for Appellant
Lewis T. Graham, Jr.

APPENDIX D

Verdict of August 2, 1982, in trial court (Record, page 2916)

PROCEEDINGS

THE COURT: All right. Ladies and Gentlemen, when the jury comes in, the written verdict will be handed to the Sheriff, and the Sheriff will hand it to me, and I will hand it to the Clerk. The Clerk will then read it. When that occurs, I want no outcries, no noise, regardless of what it is, and no one to stand up. You will remain seated until I dismiss you, please.

Will you ask the jury to step in?

Let the record show that the defendant and his counsel are present.

(Whereupon, the jury returned to the courtroom, and the following proceedings were held.)

THE COURT: All right. Let the record show that the jury has returned.

Ladies and gentlemen of the jury, have you reached a verdict? If so, would you hand it to the Sheriff, please.

THE CLERK: Ladies and gentlemen of the jury, you will listen to your verdict. We the jury find the defendant, Lewis T. Graham, Jr., guilty as charged of second-degree murder. August 2nd, 1981, David A. Laverty, Foreman.

Ladies and gentlemen, is this your verdict?

JURORS: Yes.

APPENDIX E

Defendant's August 8, 1981, motion for new trial (Record, pages 170-176)

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 114,292

STATE OF LOUISIANA

v.

LEWIS T. GRAHAM, JR.

FILED
August 18, 1981
DEPUTY CLERK

MOTION FOR NEW TRIAL

COMES NOW, Lewis T. Graham, Jr., defendant herein, and moves the court for a new trial under C.Cr.P. 851, et seq., upon the following bases:

* * * * * *

C. VERDICT CONTRARY TO LAW AND EVIDENCE

D(1).

There was insufficient evidence from which any juror could have concluded that guilt had been established beyond a reasonable doubt.

D(2).

There was insufficient evidence from which any juror could have concluded that every reasonable hypothesis of innocence had been excluded.

D(3).

Defendant's conviction thus is contrary to the constitutional and statutory schemes made and provided in such cases.

WHEREFORE DEFENDANT, asserting that injustice has been done him prays that a hearing on this motion be ordered and that in due course he be granted a new trial.

* * * * * *

APPENDIX F

Defendant's September 2, 1981, second supplemental and amending motion for new trial (Record, pages 188-190)

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 114,292

STATE OF LOUISIANA

v.

LEWIS T. GRAHAM, JR.

FILED
September 2, 1981
DEPUTY CLERK

SECOND SUPPLEMENTAL AND AMENDING MOTION FOR NEW TRIAL

COMES NOW, Lewis T. Graham, Jr., defendant herein and moves to supplement and amend his Motion for New Trial (filed August 18, 1981) and his Supplemental and Amending Motion for New Trial (filed September 1, 1981) by adding the following paragraphs:

E. NON-UNANIMOUS VERDICT

E(1).

Ten of twelve jurors concurred in the guilty verdict.

E(2).

This procedure is authorized by Article I, § 17 of the Louisiana Constitution, and is repeated in the statutes at C.Cr.P. Article 782.

E(3).

The penalty in the instant case is life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

E(4).

No differentiation in the Louisiana scheme is made between the jury requirements in this, the maximum felony penalty short of capital punishment, and the jury requirements in less seriously punished felonies.

E(5).

Moreover, it is not possible for a non-unanimous jury verdict to amount to proof beyond a reasonable doubt or alternatively to permit the conclusion that every reasonable hypothesis of innocence has been excluded, under the constitutions and statutes applicable.

E(6).

Non-unanimous verdicts in six member Louisiana juries have already been struck down. See *Burch* v. *Louisiana*, 441 U.S. 130, 60 L.Ed. 96, 96 S.Ct. 1623 (1979).

E(7).

These provisions offend considerations of due process, equal protection and fundamental fairness, and as well deny defendant the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

WHEREFORE DEFENDANT PRAYS that this supplement be allowed filed, that hearing be had, and that in due course a new trial be granted.

* * * * * *

APPENDIX G

Defendant's September 16, 1981, third supplemental and amending motion for new trial (Record, pages 191-193[a])

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 114,292

STATE OF LOUISIANA

v.

LEWIS T. GRAHAM, JR.

FILED
September 16, 1981
DEPUTY CLERK

THIRD SUPPLEMENTAL AND AMENDING MOTION FOR NEW TRIAL

COMES NOW Lewis T. Graham, Jr., defendant herein, and moves to supplement and amend his Motion for New Trial (filed August 18, 1981) as follows:

I.

By adding the following paragraphs:

* * * * * *

"F. UNCONSTITUTIONALITY OF R.S. 15:470 AND COMPLETING THE RECORD

F(1.)

It is obvious from the conduct alleged above that testimony from jurors will be required in order to make a full showing.

F(2.)

To the extent that R.S. 15:470 may be asserted to prohibit the receipt of relevant evidence on any of these points, it is specifically pled that this statute:

(a) Is repugnant to the Sixth and Fourteenth Amendments to the United States Constitution in that it denies defendant a meaningful right to trial by jury barring evidence of improper and/or irregular conduct; and

(b) Offends concepts of fundamental fairness and equal protection by establishing an arbitrary and prejudicial procedure whereby *no juror* is competent to testify to misconduct, or to explain, qualify or impeach the verdict but *every juror* is competent to rebut "any attack" upon the regularity of the jury's conduct or upon its findings. Thus the statute envisions a scheme under which irregularity may never be shown, but regularity may always be shown.

F(3.)

Accordingly, R.S. 15:470 does not properly form a bar to the completion of the record through testimony from jurors as to the irregularity of their behavior.

F(4.)

Alternatively, should the court conclude that R.S. 15:470 does constitute such a bar, testimony from jurors should still be permitted, and transcribed, so that should further proceedings on this motion for new trial be required after appellate review, the evidence will be preserved in an admissible form and not be lost owing to juror lapse of memory, unavailability, death, etc."

4.

By adding omnibus language in a supplemental paragraph ("G") to follow paragraph F, and its various subparts, as follows:

"G. LEGAL EFFECT

G(1.)

The legal effect of the conduct specified in paragraphs A, B, D, E and F, regardless of whether before specifically stated, is to subject defendant to injustice and to offend considerations of due process, equal protection and fundamental fairness, and as well deny defendant the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

G(2.)

Regarding the confession by a third party arising post-trial and its contents discussed in paragraph C, to continue to incarcerate defendant under the verdict, and without a new trial amounts to the ultimate prejudice and injustice as well as denying him due process, fundamental fairness and equal protection of the laws."

WHEREFORE DEFENDANT PRAYS that his Motion for New Trial filed herein on August 18, 1981 as previously supplemented and/or amended be supplemented and amended by adding the above and foregoing paragraphs B(14), B(15), F(1), F(2), F(3), F(4), G(1) and G(2), and that a hearing on his motion, as supplemented and amended, be had and in due course, a new trial be ordered herein.

* * * * * *

APPENDIX H

Defendant's September 28, 1981, motion in arrest of judgment (Record, pages 197-198)

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 114,292

STATE OF LOUISIANA

v.

LEWIS T. GRAHAM, JR.

FILED
September 28, 1981
DEPUTY CLERK

MOTION IN ARREST OF JUDGMENT

COMES NOW, Lewis T. Graham, Jr., defendant herein, and moves the court pursuant to C.Cr.P. Article 859, et seq.:

1.

Mover previously filed a Motion for New Trial, as variously supplemented and amended, as the record will reflect.

2.

In it, as may be seen by reference thereto, defendant raised the unconstitutionality of a non-unanimous verdict in the instant case, and raised as well the unconstitutionality of R.S. 15:470, as standing in bar of his right to demonstrate the jury's verdict was not validly reached.

3.

It occurs that both of these objections may also properly relate to the offense charged not being punishable under a valid statute, which is a ground for a motion in arrest of judgment.

4.

To the extent that they may more properly be considered in a motion in arrest of judgment, same are pled herein to the same extent as if fully set forth, it being expressly noted that the trial court has deferred judgment on the legal issues raised in the previously filed motion for new trial.

5.

But now, further, defendant shows that R.S. 14:30.1 specifies that the penalty for second degree murder shall be ". . . life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence."

6.

This sentencing scheme removes any discretion in the sentence to be assessed, and accordingly, it offends the Eighth and Fourteenth Amendments to the United States Constitution as well as Article 1, Sections 2, 3 and 20 of the Louisiana Constitution.

7.

The statute is thus unconstitutional and invalid on its face, and its sentencing scheme irrationable.

8.

The Prejudicial effect of the sentencing scheme is aggravated by the non-unanimous jury verdict authorized by Article I, Section 17 of the Louisiana Constitution and C.Cr.P. Article 782, the unconstitutionality of the non-unanimous verdict having previously been pled.

WHEREFORE DEFENDANT PRAYS this Motion in Arrest of Judgment be granted and that in due course he be discharged.

* * * * * *

APPENDIX I

Trial court rulings denying defendant's attempt to demonstrate actual prejudice from jury experiment (Record, pages 3009 on September 21, 1981, and pages 3051-3053 on September 24, 1981)

* * * * * *

Q. Okay. Was your vote the following Sunday morning, after the blood test, any different from what it was the day before?

MR. McMICHAEL: (Interrupting) I object to that, Your Honor, it's prohibited.

THE COURT: Sustained.

MR. SUTTON: Let the record note my objection to the Court's ruling.

THE COURT: What is the reason for—

MR. SUTTON: I did not ask—the question did not ask how he voted. I simply asked was his vote different from what it was before. I don't know what it was before. I'm simply asking was it different. I'm not asking how he voted, yes or no.

THE COURT: I sustain the objection.

MR. SUTTON: Let the record reflect my objection to the Court's ruling.

BY MR. SUTTON:

Q. Mr. Etheridge, you were asked earlier when you made the experiment in the motel, did you make the experiment with the intent to communicate the results to the other jurors and your answer was no, you did not.

A. That's right.

Q. Let me ask you a question. You said there were five?

* * * * * *

Q. Had they reached a verdict prior to that time?

A. I remember—the next morning.

THE COURT: Now, let me understand. You're stating a fact, not necessarily about when it was announced that you're talking about? The Clerk has got the time, it may differ.

Phrase it another way. The jury reached a verdict—reached a verdict, but it wasn't announced. Phrase it that way.

BY MR. SUTTON:

Q. Do you know when the jury, a minimum verdict required is ten to two, the Court instructed you as to that, do you know when the jury reached that point and voted, ten to two?

A. Yes, it was sometime after 1:30 and before 8:00 o'clock in the morning when the change of vote took place, in the mind of one person.

MR. McMICHAEL: (Interrupting) Your Honor, I think the question was when was the vote taken.

THE COURT: Sustained.

WITNESS: Okay.

BY MR. SUTTON:

Q. All right, sir. Did—

A. Excuse me.

THE COURT: Let me ask you this way, sir, and the way I think it should be answered. When did you get back? What time did you get back in order to deliberate, all 12 of you together and where?

WITNESS: We all gathered at the Courthouse to deliberate the next morning about 9:00 o'clock, 8:30 to 9:00 o'clock.

THE COURT: And how long were you in there before you reached a verdict?

WITNESS: 30 minutes, 20 minutes, something like that.

THE COURT: All right.

BY MR. SUTTON:

Q. Let me ask a question another way. You said that this private meeting that you had, there were five of you meeting in David Laverty's room?

A. That's right.

Q. There were seven jurors that were not there?

A. That is correct.

Q. Prior to coming to that room early that morning, meeting in that private meeting, the jury had been unable to reach a verdict, is that correct?

A. That is correct.

Q. Was the minority of the jury present in that room with the five?

MR. McMICHAEL: Objection, Your Honor.

THE COURT: Let's think about that. If we go into that, we're going to go all the way, I expect.

MR. SUTTON: Your Honor, let me explain to the Court why I'm asking that question.

THE COURT: I sustain the objection.

MR. SUTTON: Objection to the Court's ruling is noted for the record.

BY MR. SUTTON:

Q. Mr. Reeves, you mentioned earlier that from the 5:00 o'clock—I'm sorry, from approximately midnight to prior even when you could not reach a verdict, after that the test was done and Mr. McDonald's statement was made about the five days and then the next morning the jury deliberated and voted and reached a verdict, was the—the people present in that private meeting of the five, did the person present at the experiment change his vote to guilty the next morning?

MR. McMICHAEL: (Interrupting) Objection, Your Honor, that's the same question.

MR. SUTTON: Let the Court note my objection to the Court's ruling, directly reflected.

BY MR. SUTTON:

Q. After the blood test was made in David Laverty's room, do you know how many votes were taken after that?

A. Only one vote and that was the next morning.

Q. Okay.

THE COURT: How many votes had you had previously?

WITNESS: I believe three votes the night before. We had had three votes and without reaching a verdict. I may be mistaken, it may have been four or two, several times.

* * * * * *

APPENDIX J

Trial court's October 10, 1981, ruling on motion for new trial and motion in arrest of judgment (Record, pages 3124-3126)

* * * * * *

THE COURT: Any further arguments?

MR. SUTTON: No, sir.

THE COURT: The argument this morning with reference to Article 470 of Title 15 that that article is unconstitutional is not sufficient. The contention that it's unconstitutional and unconstitutionally applied is incorrect. I mentioned during the course of counsel's argument that our court and others have not raised Article 470 as a bar to questioning of jurors where the contention was made with some factual basis about a constitutional deprivation of rights being involved. It doesn't open the door in all cases, but those that seem to be serious and germane to the constitutional issue, for which reason that states my grounds.

Our Supreme Court of the State of Louisiana has looked at and considered the argument made by counsel for the defendant with reference to the penalty for second-degree murder. They have looked at it with regard to the ten-out-of-twelve verdict and the combination of the two. They have found it constitutional.

I do happen to note in this case, as well as others, the Supreme Court has said that, if requested, the Court must instruct the jury on the penalties. It was done in this case. The jury knew the penalty and they knew the penalty for the other responsive verdict, also. They knew the penalty. They were likewise instructed to decide the case on the facts and that the penalty was the concern of the Court within the framework. They did know about it, and this is the verdict that they returned.

There have been no authorities that I have seen, nor have been cited to me in argument this morning that the Court should rely on. It says that mandatory life imprisonment without benefit of parole, probation, or suspension of sentence in this murder charge is unconstitutional. For this reason, that particular contention is insufficient. I'm going to mention this, also. During the trial, we had a Motion for Directed Verdict at the close of the State's case. The State at that time overruled the motion but gave no reasons. The law does not provide for a Motion for Directed Verdict as such, but there is some question about it for which reason I will rule as follows on the Motion for Directed Verdict, because I specifically said my reasons would be presented later.

The Motion for Directed Verdict at the close of the State's case was denied in addition for the reason that the evidence presented in the case—I want to dictate it so the reporter will get it right—the evidence presented in this case, as seen in the light most favorable to the prosecution, is adequate to justify the jury's conclusion beyond a reasonable doubt that the defendant is guilty, in fact, a rational trier of fact could well have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded. Even the letter presented in evidence on the Motion for New Trial would not have presented an independent ground for a reasonable hypothesis of innocence of this defendant.

It's my opinion that the entire Motion for New Trial and the Motion in Arrest of Judgment should be overruled, and it is overruled. Objection by the defense is noted to my ruling.

MR. SUTTON: Let the record note the defense's objection. Your Honor, Article 873 provides for a twenty-three-hour delay after the Court's ruling before imposition of sentence unless that delay is waived. We would specifically call for the record at this time to waive that delay and ask that the Court go ahead and impose sentence in this case, since the sentence is fixed and mandatory, and there is no necessity for pretrial investigation and that sort of thing. We would ask the

Court to allow us to waive that and ask for immediate sentence at this time.

* * * * * *

APPENDIX K

Denial of defendant's October 10, 1981, motion for individualized (i.e. non-mandatory) sentencing (Record, page 3130)

* * * * * *

For a completion of the record, before the Court actually imposes sentence, I would like to request to the Court to exercise Article 893, which provides for a suspension of sentence, though I recognize in that article it says when it appears in the best interest of the public and defendant will be served for this conviction of a felony for which punishment is with or without hard labor—skipping some of it—may suspend for the first conviction only the imposition execution of any sentence where suspension is allowed by law, and in either case place defendant on probation under supervision of the Division of Probation and Paroles.

I would like to ask the Court to show the defendant did ask the Court to impose Article 893 as well as 894.1, which the Court is perfectly aware of, the sentencing guidelines.

THE COURT: The matter that you mentioned, Counsel, has no application to this case, and your request is denied. I might state for the record that I have ruled previously that the evidence produced—

MR. SUTTON: Could I note my objection to the Court's ruling?

* * * * * *

APPENDIX L

Trial court's October 10, 1981, sentencing of defendant (Record, page 3131)

* * * * * *

It is the judgment of this Court that Lewis Graham, that you are sentenced and shall be sentenced and are sentenced to life imprisonment at hard labor in the custody of the Louisiana Department of Corrections without benefit of parole, probation, or suspension of sentence. I advise you, sir, that you have a right to appeal at which you may hire your own lawyer if you are able. If you are unable to, one will be appointed for you at no cost. But if you do that, sir, you must make it within fifteen days from today.

APPENDIX M

Defendant's October 10, 1981, motion for appeal to the Louisiana Supreme Court and order granting same (Record, page 3131)

* * * * * *

MR. SUTTON: May it please the Court, the Code also provides in a Motion for Appeal, it may be oral in open court. We would make such a motion at this time, and ask the Court to affix a return date for the appeal. For the completion of the record, we also would like to object to the imposition of sentence for the reasons cited. We would like to make an oral Motion for Appeal and ask the Court to return.

THE COURT: Well, first of all, if I understand, one of your motions, whatever it was, was rejected. I will grant your appeal. However, Mr. Clerk, would you name the return date, please, sir?

THE CLERK: November the 27th.

* * * * * *

APPENDIX N

Defendant's December 16, 1981, assignments of error to the Louisiana Supreme Court (Record, pages 204-205 [a] and [b])

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 114,292

STATE OF LOUISIANA

v.

LEWIS T. GRAHAM, JR.

FILED
December 15, 1981
DIANNE ELLZEY
DEPUTY CLERK

DEFENDANT'S ASSIGNMENT OF ERROR

COMES NOW Lewis T. Graham, Jr., defendant herein, who was wrongfully convicted of Second Degree Murder on August 3, 1981 in these proceedings and respectfully submits the following assignments of error concerning same:

* * * * * *

(4) The verdict is contrary to the law and the evidence in that there was insufficient evidence from which reasonable persons could have concluded that guilt had been established beyond a reasonable doubt;

* * * * * *

(6) Defendant was tried and convicted under Article I, Section 17 of the Louisiana Constitution and Code of Criminal Procedure Article 782, which are violative

of the Sixth and Fourteenth Amendments to the United States Constitution in that they authorize a non-unanimous jury verdict for a crime that mandates a penalty of life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

(7) That the special "blood test" conducted by juror Ethridge outside the jury deliberation room but in the presence of four other jurors, and communicating the results thereof to the other four jurors, and then changing his vote from "Not Guilty" to "Guilty" on the basis of such special blood test was prejudicial error;

* * * * * *

(9) The trial judge's sustaining of the District Attorney's objection to defendant submitting evidence of jury misconduct, under the authority of R.S. 15:470, was prejudicial error in that R.S. 15:470 is violative of the Sixth and Fourteenth Amendments to the United States Constitution;

(10) The trial court's overruling of defendant's Motion for New Trial was error and contrary to law;

(11) The trial court's overruling of defendant's Motion In Arrest of Judgment was error and contrary to law.

(12) The penalty provision of R.S. 14:30.1 is violative of the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 3 and 20 of the Louisiana Constitution.

* * * * * *

APPENDIX O

State's closing argument at trial on August 1, 1981, relative to blood coagulation time being the "most important" aspect of the evidence (Record, page 2835)

* * * * * *

But most important was the fact that some of these spots and spatters also had clotted blood, which means that the defendant must have been two to four feet away from his wife at the time she was beaten the last time, or at least five minutes after the first beating occurred. That would, of course, be inconsistent with the story the defendant tells, that he was on the floor for a few seconds and then thrown over to the other side of the room on his stomach. There is no way he could have gotten clotted blood spatters on the front of his shorts unless he was two to four feet away from his wife at the time the final blow was struck.

* * * * * *

APPENDIX P

Post-Conviction Confession By Third Party, Filed With Defendant's August 18, 1981, Motion For New Trial (Record, Pages 179-182)

* * * * * *

To be revealing the truth. I have run with a group that robs from stores and homes basically for the fun of it. It makes life a little bit interesting. At best we generally never get anything over $200.00 and by the time you split it up it is only spending money. That is all we are into!! Sometimes we break into homes that we know just to say we've been there. On March 30th, me and tom (made up name) was cruzing. We decided to stay up and try to get some cash. We enter the garage and were fooling around—[[for the benefit of those who don't know what it is like to steal—thiefs [sic] are pretty relax people—time is on our side—we're in no major hurry—for example one night after looking around in a garage for 45 minutes we found the keys to a house and walked in the front door just like we had good sense]]—Tom started to use a crow bar and then a screw driver on the door but I told him to stop, that was no good! Later, we find a knife in a tool box that will open a door much better. I kept the knife on me while Tom gets the hammer. This is for self-protection in case someone accidentally wakes up and trys [sic] to attack us!! We enter the house & are just looking around for a while. We enter the bed room to see what might be in there. [[I have been in several bedrooms when people are asleep—it is no big deal—I got my best coin collection that way. One night we were in a house and heard a couple making love—we just listened for a while and then left and laugh [sic]—I am trying to strees to ya'll that we are a bunch of amatures [sic] and are not professionals going for the entire house—nor murders]] But this night was grossly different and I can't explain any whys [sic] that things happened as they did. But Tom hits her when she awakens—damn I'm scared now. I grabed [sic] him before he would get me. Tom assisted me with

him. I stabbed him but not with the intent of killing him—just wanting to weaken him. We knocked him out. All this is not what we came in *for!!* I was scared about her. He hit her too hard—he only needed to knock her out. I pulled her over so I could see and damn it I wanted to die. I told Tom I didn't know if she was alive or dead but I hoped she was dead—SO SHE WOULDN'T BE IN PAIN—for I knew if she was alive she must be hurting more than me. TOM must have agreed for he hit her one more time. Our main concern now is to leave and to get the hell out of there.

I'm sorry. I didn't mean to. We didn't plan this. I just wish we never enter [sic] that house or that she never woke up. But that is the past. I don't know which, I am the most sick for what I did or what you (society) had done to an innocent man!! Who is the sickest—Just Who—Ya'll are ao stupid and so narrow minded. How would ya'll like to lose your spouse and then go to jail for it—I HATE YA'LL—IGNORANT PEOPLE—All those damn observers could say was either Graham did it or a psychopath did it—and if it was a psycho he would have killed the kids and why just her—Well, everybody has got a small brain—ever thought about an accident!!!—Did that ever enter ya'll's stupid minds!

* * * * * *

No. 82-1307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEWIS T. GRAHAM, JR.

APPELLANT,

v.

STATE OF LOUISIANA

APPELLEE.

On Appeal From The Supreme Court Of Louisiana

MOTION TO DISMISS THE APPEAL LODGED BY APPELLANT FILED ON BEHALF OF THE STATE OF LOUISIANA, APPELLEE

PAUL J. CARMOUCHE
District Attorney
BARBARA B. RUTLEDGE
Assistant Attorney General
JAMES C. MCMICHAEL, JR.
PAUL J. CARMOUCHE
Trial Counsel
DALE G. COX, JR.
Counsel on Appeal
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101
(318) 226-6826

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STATEMENT OF THE CASE

On March 31, 1980, Kathleen Graham was beaten to death while she slept in the bedroom of her home at 2033 South Kirkwood in Shreveport, Caddo Parish, Louisiana. Expert testimony from two coroners who performed her autopsy showed that a sledgehammer found near her bed was probably the instrument that caused her death. Her blood type was discovered on the sledgehammer.

When Kathleen Graham went to sleep that night there were only four (4) other people in her home. Her husband, Lewis T. Graham, Jr. shared the master bedroom with her; her sons David, age 16, and Eric age 12, shared a

bedroom and her daughter Katie, age 7, had a separate bedroom.

At 5:09 a.m. March 31, 1980, Lewis Graham called the Shreveport Police advising them that intruders had broken into his home and severely injured his wife. When police arrived they found Mrs. Graham lying on her back on the left side of the bed. Her face was covered with blood, the result of a savage beating. Blood was everywhere in the master bedroom. Police found a sledgehammer and a knife on the floor of the bedroom. Both of these items belonged to Lewis Graham, Jr. They also saw a great deal of blood on the right side of the bed. Graham had blood on the front and back of his t-shirt and the front of his undershorts. These were the clothes in which he had slept that night. The shower, tub and lavatory in the master bedroom were wet and blood was found in the lavatory.

Police canvassed the inside and outside of the Graham home and in their opinion no forced entry of that home had been made. They found the garage door partially open and in the driveway police found a can of coins and flashlight. Both items belonged to Dr. Graham's family. Not taken by the intruders was Mrs. Graham's diamond ring which was located in a box in the dresser drawer of the master bedroom. Inside the den of the home police saw liquor bottles strewn thoughout the floor. They also saw a knife sheath which housed the knife they had earlier found in the master bedroom. Everything the police found belonged to the Graham family.

The autopsies of Kathleen Graham revealed that she died because of blunt head trauma caused by an instrument consistent with the sledgehammer found in her bedroom. Dr. George McCormick, a Forensic Pathologist, testified that Mrs. Graham had sustained at least four

blows to the top of her head with a sledgehammer while she was lying on her left side on the right side of the bed. These blows were struck in rapid succession and rendered her unconscious. She lived for some fifteen to thirty minutes after the first blows were struck. Dr. McCormick testified that after the first set of blows she moved or was moved onto her back on the left side of the bed where she received what he considered to be the final blow, a massive blow to her forehead also delivered with the sledgehammer. Mr. Herbert McDonnell, the State's expert in blood splatter matters, testified there was at least a five minute interval between the first set of blows and the final blow to Kathleen Graham.

Scientific tests revealed that the spatters of blood on the front of Graham's t-shirt and the drips of blood on the back and front of his right shoulder were Type A blood. Spatters of blood on his undershorts were Type A blood. The blood on the sledgehammer was Type A blood. Kathleen Graham was blood Type A; Lewis Graham was blood Type O.

Lewis Graham suffered a small abrasion on his forehead which required no medical treatment; a superficial cut across the entire palm of his left hand which required no medical treatment; and an incision type wound on the flank underneath his left arm which required one stitch to close. The blood stain under the left arm which corresponded to the location of the incision type wound on Graham's body was determined to be Type O. Police technicians found Mr. Graham's fingerprint on the knife.

The Graham children were not harmed at all. Indeed they were never awakened until Graham telephoned the police and awaited the arrival of a neighbor from across the street. Graham and the neighbor woke the children together.

Lewis Graham gave several statements to the police. Essentially he related that his wife woke him between 2:00 and 3:00 a.m. on the morning of the crime claiming that she heard noises. After he checked the house and found all of the doors closed he returned to the bedroom and went back to sleep. Sometime thereafter he remembered the bed lurching and he heard a scream. He felt he was pulled from the bed by more than one person who manhandled him. He felt a sharp pain under his left arm. He remained on the left side of the bed for a few seconds before he was thrown across the room where he fell onto his stomach and lay unconscious. He was unable to describe anything about his assailants. When he awoke he saw the terrible scene described above. Thereafter he telephoned the police.

The State's expert witness in the field of blood splatter interpretation was Herbert McDonnell. He gave the opinion that Kathleen Graham was the victim of two separate beatings, the first while she lay on the right side of the bed lying on her stomach. The second came after she moved or was moved to the left side of the bed. He concluded that the blood stains on the front and back of the right shoulder of Mr. Graham's t-shirt were consistent with the type of cast-off spatter normally found on the shirt of a person who had swung overhead an object similar to the sledgehammer in this case. He concluded that the size and concentration of the blood stains on the front of Mr. Graham's t-shirt indicated that Graham was within two to four feet of the victim at the time she was beaten. He concluded that blood found on the defendant's undershorts was coagulated blood. He opined that human blood coagulates in three to five minutes and thereby concluded that there was a three to five minute interval between the separate beatings. From the size and concentration of the blood splatters, on the front of the

defendant's undershorts, Mr. McDonnell concluded that the defendant was within two to four feet of the victim when the last beating was administered. He also identified what he believed to be wipe marks down the left side of the defendant's t-shirt. He opined that these marks were consistent with the knife having been wiped on the t-shirt several times.

The State of Louisiana tried Lewis Graham for second degree murder.[1] The trial lasted three weeks. The jury was sequestered. A review of the entire record will reveal that the trial of this case was legally flawless. At the conclusion of the evidence the trial judge instructed the jury regarding the rule of direct and circumstantial evidence.[2] The jurors deliberated overnight and the next morning returned a verdict: guilty as charged by a vote of 10-2.

After the verdict was returned it was discovered that after deliberation had concluded for the night one of the jurors had performed an experiment in the hotel room while some of the other jurors watched. This juror pricked his finger and a watch was used to gauge the time it

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[1] "Second degree murder is the killing of a human being: (1) when the offender has a specific intent to kill or to inflict great bodily harm; or (2) when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence."

[2] The pertinent part of the jury instruction is attached as Appendix "A".

took his blood to coagulate. The next morning the jurors reached a 10-2 verdict.

Pursuant to the defendant's motion for new trial an evidentiary hearing was held at which the defendant was allowed to produce evidence that the jury was deadlocked on the first night of deliberation; that they retired to their hotel room; that there the blood experiment was conducted. The defendant was allowed to develop the names of the persons who were present and the name of the juror who conducted the experiment. A juror also testified that after the blood experiment was conducted the jurors returned for deliberation and one of the jurors changed his vote thereby giving the jury the necessary ten votes for a conviction. Defendant was not allowed to inquire which juror changed votes. A juror did testify when the verdict was reached in relationship to the time of the experiment. [Transcript 3042-3055] The trial judge denied the motion for new trial along with the defendant's motion in arrest of judgment. The Louisiana Supreme Court affirmed the conviction and sentence in its opinion reported at 422 So.2d 123.

Appellant lodged his jurisdictional statement with this Court on three grounds. This Court has asked that appellee respond with its position. The State moves this Court to dismiss the appeal which appellant has lodged and to affirm the judgment of the Louisiana Supreme Court.

THE JURY PRIVILEGE STATUTE

The State of Louisiana submits that question number one concerns the jury privilege statute *La. R. S. 15:470.*[3]

The State submits that question number one should be dismissed because it does not present a substantial feder-

[3] See Appendix "B"

al question. Appellant contends that *R. S. 15:470* violates his Sixth and Fourteenth Amendment constitutional rights to confrontation, fair trial and due process because it prevents him from inquiring which juror changed votes in this case and exactly when this change took place. Appellant does not contend that his constitutional rights were abridged because the statute prevented his inquiry into the mental processes of the jurors.

The policy behind *R. S. 15:470* protects jury verdicts by insulating them and the jurors who render them from constant second guessing. It assures finality. The Court has approved this policy. See *McDonald* v. *Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915) and *Mattox* v. *United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892) The Louisiana Supreme Court has approved the policy in *State* v. *Wisham*, 384 So.2d 385 (1980). The Fifth Circuit United States Court of Appeals has approved this policy in *Llewellyn* v. *Stynchcombe*, 609 F.2d 194 (1980).

The State is not cited to any authority that allows an accused to probe the mental processes of the jury which convicted him. [See appellant's Jurisdictional Statement, pages 16-17] Thus the narrow issue raised by question one is the scope of the inquiry. The Louisiana Supreme Court has interpreted this statute in such a way that it must yield to an accused's constitutional rights. Thus the Louisiana Supreme Court in its opinion in *Graham*[4] approved *Durr* v. *Cook*, 589 F.2d 891 (1979) which mandated an inquiry of the jury regarding misconduct by the jurors during deliberation. The Louisiana Supreme Court adapted the Fifth Circuit's rule regarding prejudice in these kinds of cases i.e. was there a reasonable possibility

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[4] 422 So.2d 123 at pp. 131, 132.

of prejudice as the result of the juror's misconduct. The Louisiana Supreme Court reasoned that if the accused does not have to show actual prejudice the scope of *R. S. 15:470* can be constitutionally limited to the inquiry approved by the Fifth Circuit in *Durr* v. *Cook*. Acting on this premise they detailed the weight of the evidence against the accused and determined that there was no reasonable possibility that prejudice resulted from the blood experiment in this case.[5] Thus the only real inquiry that could make any difference to the defendant is a probing of the jurors' mental process i.e. who changed votes and why? Since appellant does not contend that he has this right nor that the Constitution affords him this right there is no substantial federal question remaining. The inquiry who changed votes and when simply adds nothing material to the analysis which the Louisiana Supreme Court has already made of the total evidence against the accused.

The cases upon which appellant relies for his proposition are distinguishable. In *Smith* v. *Phillips*, ___ U.S. ___, 71 L.Ed.2d 78, 100 S.Ct. 940, (1982), the prosecution had withheld knowledge of a trial juror's application for employment with their office during the time the juror served on the defendant's trial. The disclosure was made post-trial and the State Judge held an evidentiary hearing. This Court on Writ of Habeas Corpus from the Federal Circuit upheld the trial jury verdict saying that due process requires that an accused be permitted to show actual bias in a juror impartiality situation.

The *Smith* case did not deal with the interpretation of a state statute defining the scope of the hearing to determine actual bias. Indeed the New York State Court con-

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[5] These facts are reproduced from their opinion as Appendix "C".

ducted an evidentiary hearing in which the juror was allowed to adduce evidence about the misconduct. The Court said that the evidence adduced was constitutionally sufficient. Hence, even under the *Smith* doctrine the juror could not be asked if the job application affected his vote. The State submits that *Smith* does not stand for the proposition that in a juror experiment case due process requires greater inquiry than that allowed by the Louisiana Supreme Court in our case.

In *Dennis* v. *United States*, 339 U.S. 162, 94 L.Ed. 734, 70 S.Ct. 519 (1950), the accused claimed his due process rights were violated by a trial jury composed of government employees who had all signed a loyalty oath and who had to pass on the accused's (a communist) behavior. This Court said in dicta that there could be no implied bias that prevented a government employee from serving on a jury. The accused is entitled (was required) to show actual bias. This case did not deal with the accused's attempt to challenge a juror's verdict but rather defendant appealed an erroneous denial of his challenge for cause during voir dire. Moreover this case did not interpret a statute of the District of Columbia which defined the scope of inquiry into jury verdicts.

In *Remmer* v. *U.S.*, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954) the Court ordered a remand for an evidentiary hearing to determine the effect that an outside contact with the juror during the trial had on the case. *Remmer* did not define the scope of the hearing that was to determine harmfulness nor did it interpret a statute that would seek to define the scope of that hearing. Hence these three cases really have no persuasive effect on the Court in this case.

The State of Louisiana submits that because of the evidence against the accused there was no reasonable

possibility of prejudice raised by the juror's experiment. Because the accused has been given the opportunity to make every showing necessary to a reasonable possibility of prejudice and because the accused does not otherwise contest the constitutionality of *R. S. 15:470* there is no substantial federal question presented by this issue. Hence the appeal on question number one should be dismissed.

ASSIGNMENT OF ERROR NUMBER II

Appellant contends that the Louisiana statutory scheme which allows a non-unanimous verdict in a second degree murder prosecution is unconstitutional. He contends this is so because second degree murder provides a mandatory life sentence at hard labor without benefit of parole, probation or suspension of sentence and that the Constitution (the Sixth, Eighth and Fourteenth Amendments) should preclude a man automatically going to jail for the rest of his life upon the vote of less than all the jurors that heard his case.

Appellant also challenges a non-unanimous verdict because it violates his Sixth Amendment right to trial by jury as applied to the States through the Fourteenth Amendment and because it violates his Fourteenth Amendment right to due process and equal protection of the laws. He challenges the mandatory sentence provided by *La. R. S. 14:30.1* because it violates the Eighth Amendment prohibition against cruel and unusual punishment as applied to the States through the Fourteenth Amendment.

The State of Louisiana submits the challenges are without merit individually and in combination.

THE NON-UNANIMOUS VERDICT

Article 1 Section 17 of the Louisiana Constitution of 1974[6]*; La. C. Cr. P. Article 782*[7] are the authorities for Louisiana's scheme allowing less than unanimous verdicts in non-capital cases where the punishment is necessarily at hard labor. The Court has held in *Johnson* v. *Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed. 2nd 152 (1972) that a non-unanimous verdict (9-3) did not violate the accused's constitutional rights to due process or equal protection of the law. The crime involved in *Johnson* was armed robbery which is punishable by a sentence of not less than five (5) nor more than ninety-nine (99) years at hard labor without benefit of parole, probation or suspension of sentence.[7a]

Furthermore in *Apodaca* v. *Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed. 2nd 184 (1972) the Court held that a 10-2 verdict did not violate the accused's Sixth Amendment right to trial by jury as applied to the States through the Fourteenth Amendment.

Appellant does not cite any authority that holds otherwise in cases composed of twelve (12) person juries. *Burch* v. *Louisiana*, 441 U.S. 130, 60 L.Ed. 2nd 96, 99 S.Ct. 1623 (1979) held unconstitutional Louisiana's statutory scheme that allowed less than unanimous verdicts in six (6) person jury cases. The Court's reasons for reversal in *Burch* were largely the same that it used in holding unconstitutional five person juries in *Ballew* v. *Georgia*,[8] 435 U.S. 223, 55 L.Ed. 2nd 234, 98 S.Ct. 1029

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[6] See text as Appendix "D"

[7] See text Appendix "E"

[7a] See text Appendix "F"

[8] These reasons are cited at pp. 241-246 of the opinion.

(1978). In *Ballew* the Court referred to studies casting doubt on the validity of verdicts rendered by five (5) member juries. The Court's reasons for reversal in *Ballew* had nothing to do with the rule of non-unanimity but rather with the total size of the jury. Hence the reasoning of *Burch* is not relevant to the requirement of unanimity in twelve (12) person juries. Neither *Burch* nor *Ballew* even hint that the same concerns are present when the trier of fact is composed of twelve (12) persons. The State submits that the non-unanimous verdict in twelve (12) person juries is still constitutional after *Burch*.

THE MANDATORY SENTENCE

Appellant contends that the penalty for second degree murder violates his Eighth Amendment right against cruel and unusual punishment as applied to the States in the Fourteenth Amendment. Appellant makes this argument because the statute removes discretion from the sentencing judge and because he has no right to parole, probation or suspension of sentence. Appellant contends that for him this sentence is the legal equivalent of a death sentence. In those cases individualized, articulated reasons for sentence are required. See *Furman* v. *Georgia*, 408 U.S. 238, 33 L. Ed. 2nd 346, 92 S.Ct. 2726 (1972).

The State submits that the mandatory penalty for second degree murder is constitutional. The Court has held that non-capital sentences are left to the sound discretion of State legislatures. *Hutto* v. *Davis*, ____ U.S. ____, 70 L.Ed.2d. 556, 102 S.Ct. 703 (1982). The Court has rejected a proportionality analysis in interpreting a Texas recidivist statute that resulted in the defendant's life sentence after his third conviction for theft. See *Rummell* v. *Estelle*, 445 U.S. 263, 63 L.Ed. 2nd 382, 100 S.Ct. 1133 (1980). The Court has also said that individualization of sentences is not required in non-capital cases though

required in capital cases; *Lockett* v. *Ohio*, 438 U.S. 586, 57 L.Ed. 2nd 973, 98 S.Ct. 2954 and has implied the same in *Woodson* v. *North Carolina*, 428 U.S. 280, 49 L.Ed. 2nd 944, 96 S.Ct. 2978 at 2991 (1976). The Court has concluded that it is constitutionally impossible to compare sentencing schemes in non-capital cases because of the variables involved. The unique finality of the death penalty compels a different constitutional result.

In *Schick* v. *Reed*, 419 U.S. 256, 42 L.Ed. 2nd 430, 95 S.Ct. 379 (1974) the Court held that a presidential commutation of a death sentence to life imprisonment without benefit of parole did not offend the Constitution. See also the Ninth Circuit's approval of a mandatory life sentence without benefit of parole against an Eighth Amendment challenge in *U.S.* v. *Valenzuela*, 646 F.2d 352 (1980). Other jurisdictions have approved mandatory life sentences which do not allow the benefit of parole. See *Annotation at 33 ALR 3rd 335 Section 7A.*

The Louisiana Supreme Court has recently sustained the penalty for second degree murder against a challenge that it was cruel and unusual where the verdict was non-unanimous. See *State* v. *Parker*, 416 So.2d 545 (1982) at page 552; it has also upheld a mandatory life sentence without benefit of parole, probation or suspension of sentence in an aggravated rape case, specifically rejecting the proportionality test advanced in *Hart* v. *Coiner*, 483 F.2d 136 (1973) 4th Cir. See *State* v. *Talbert*, 416 So.2d 97 (1982) at page 102.

Louisiana tempers its mandatory sentence scheme with provisions allowing executive grace. *La. R. S. 15:572 A*[9] and *La. R.S. 15:474.4B*[10] allowed appellant ear-

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[9] *La. R. S. 15:572.A* — "The governor may grant reprieves to persons convicted of offenses against the state and, upon recommen-

ly release through pardon or parole. This statutory scheme proves the wisdom of allowing local legislatures to define punishment for non-capital felonies. By these provisions Louisiana has provided an executive check and balance on the judicial system. This is one further reason that the mandatory sentence scheme is not unconstitutional.

The State of Louisiana submits that its mandatory life sentence for second degree murder does not offend the Eighth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment.

THE COMBINED EFFECT OF THE NON-UNANIMOUS VERDICT WITH THE MANDATORY SENTENCE

Appellant further contends that the effect of a non-unanimous verdict producing a mandatory life sentence without benefit of parole is unconstitutional. The State submits that the two concepts cannot be reasonably combined because the rationale the Court has used in sustain-

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dation of the Board of Pardons as hereinafter provided for by this Part, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses."

[10] *La. R. S. 15:574.4B* — "No person shall be eligible for parole consideration who has been convicted of armed robbery and denied parole eligibility under the provisions of *R. S. 14:64*, or who has been convicted of violation of the Uniform Narcotic Drug Law and denied parole eligibility under the provisions of *R. S. 40:981*. No Prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years. No prisoner may be paroled while there is pending against him any indictment or information for any crime suspected of having been committed by him while a prisoner."

ing them individually proves they have nothing to do with each other.

The rationale that supports a non-unanimous verdict concerns the size of the community's cross section that will adjudicate guilt or innocence, not the sentence that will result in the event of a conviction. The rationale that allows mandatory sentencing in non-capital felonies comes from the fact that there is no constitutional way to compare variables in non-capital sentencing, thus the matter is left to the discretion of State legislatures. It has nothing to do with the size of the body which acted as the trier of fact.

Appellant would have the Constitution mandate lower courts to consider these two together. Thus, Courts could be called on in given cases to weigh the possible penalty involved, the age of the accused, and the life expectancy of the accused in order to determine the number of jurors required to convict the accused in that case. Thus, a sixty (60) year old person convicted of aggravated burglary[11] would face the practical equivalent of a life sentence even though his sentence is discretionary with the judge. Does the Constitution compel his jury to be unanimous in order to convict? The State submits that it does not. Indeed, Frank Johnson[12] faced a potential life sentence and this

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[11] *La. R. S. 14:60* — "Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender, (1) is armed with a dangerous weapon; or (2) after entering arms himself with a dangerous weapon; or (3) commits a battery upon any person while in such place, or in entering or leaving such place.

Whoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years."

[12] See *Johnson* v. *Louisiana, supra.*

Court held his jury need not be unanimous in order to convict. There are many variables on this theme but the appellant's logic if followed would yield a chaotic result.

The State submits that question number two presents no substantial federal inquiry because the Court has addressed these issues previously and has rejected them.

ASSIGNMENT NUMBER III

By this assignment the appellant contends that the Louisiana Supreme Court erred in failing to hold that the Fourteenth Amendment as announced in *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed. 2nd 560, 99 S.Ct. 2781 (1979) requires the prosecution in a circumstantial evidence case to exclude every reasonable theory of the defendant's innocence beyond a reasonable doubt.

The State submits that this contention should be rejected for two reasons: (1) Appellant did not properly raise the question and (2) the Due Process Clause does not require this standard of proof in a circumstantial evidence case.

Appellant did not contend in his motion for new trial that Due Process required the State to exclude every hypothesis of his innocence beyond a reasonable doubt.[13] Appellant did not assign it in his assignment of errors.[14] Appellant merely contested the evidentiary sufficiency of the State's proof in light of these two standards. While the Louisiana Supreme Court did address this issue[15] it

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[13] See appellant's Jurisdictional Statement Appendix E. pp. 31a, 32a.

[14] See appellant's Jurisdictional Statement Appendix N pp. 55a, 56a.

[15] See that part of their opinion reproduced as Appendix "G"

was not called on to do so in the appeal. Hence the Court should not review this issue. [Rules of the Supreme Court of the United States; Rule 16.1(b)]

The State submits that the Due Process Clause of the Fourteenth Amendment does not require this standard of proof in a circumstantial evidence case. The Court in *Jackson* v. *Virginia, supra* specifically declined to require this standard of proof. In *Jackson* the Court said:

> "Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. *Holland* v. *United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150. We decline to adopt it today." (*Jackson* v. *Virginia* at pages 2792, 2793)

The *Jackson* case dealt with a question of specific intent to kill. The only eyewitness to the crime was the defendant. His version of the crime was apparently produced in the form of a self serving post Miranda statement to the police. The balance of the evidence against the defendant was entirely circumstantial. Thus, even though *Jackson* did not deal with a state statute defining the burden of proof in circumstantial evidence cases it dealt with a circumstantial evidence case as surely as the *Graham* case did. In our case, Lewis Graham provided the only eyewitness account of parts of the crime. He gave his version of the crime through his post Miranda statements to police and his trial testimony. The rest of the evidence against him was circumstantial. If *Jackson* v. *Virginia* did not require a more rigid standard of proof under its facts, neither did the Louisiana Supreme Court err in not requiring that standard on these facts.

The fact that the Louisiana statutory scheme defines the burden of proof in circumstantial evidence cases and

that the Louisiana Supreme Court in a prior case *State* v. *Austen*, 399 So.2d 158 (1981) combined the rules of proof i.e. beyond a reasonable doubt to the exclusion of every reasonable hypothesis of innocence, does not mean (1) that the Due Process Clause requires a dual standard or (2) that the Louisiana Supreme Court could not retreat from that analysis. *Jackson* v. *Virginia* said that due process acts as a lower limit on an appellate court's definition of evidentiary sufficiency. See *Tibbs* v. *Florida*, ___ U.S. ___, 72 L.Ed. 2nd 652, 102 S.Ct. ___.

In *Graham* the Louisiana Supreme Court reviewed the sufficiency of the evidence using both the test announced in *Jackson* and the test provided by *La. R. S. 15:438.*[16] This analysis satisfies the standard which the defendant now seeks. For this Court to rule that Due Process requires the State to exclude every reasonable hypothesis of the defendant's innocence beyond a reasonable doubt would allow the State legislatures to define the scope of due process.

When the evidence against Lewis Graham is viewed in the light most favorable to the prosecution a rational juror could rationally conclude beyond a reasonable doubt that he was guilty of murdering his wife. While due process does not require more the State submits this evidence also excluded every reasonable theory of his innocence.

Because the Court has previously rejected the position appellant now advances, there is no substantial federal question for review. The Louisiana Supreme Court has satisfied due process in its review of these facts. Assignment number three should be dismissed.

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[16] See Appendix "H"

CONCLUSION

The State of Louisiana moves this Court to dismiss the appeal which Lewis Graham has lodged because it does not merit plenary review. The State prays that this Court affirm the judgment of the Louisiana Supreme Court which affirmed Mr. Graham's conviction and sentence.

Respectfully submitted,

STATE OF LOUISIANA

BY: Dale G. Cox, Jr.

DALE G. COX, JR.
Counsel on Appeal
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

Paul J. Carmouche

PAUL J. CARMOUCHE
Trial Counsel
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

CERTIFICATE

We hereby certify that we are members of the Bar of this Court and that appropriate copies of the above and foregoing motion to dismiss the appeal lodged by appellant have been served upon all parties required to be served herein all in accordance with the Supreme Court rules by depositing same in the United States Mail with First Class postage prepaid addressed as follows:

(1) Mr. Bobby D. Sutton
Counsel of Record
Burnett, Sutton, Walker and Callaway
(A Professional Law Corporation)
1400 Youree Drive
Shreveport, Louisiana 71101

(2) Mr. Glen Walker
Of Counsel
Burnett, Sutton, Walker and Callaway
(A Professional Law Corporation)
1400 Youree Drive
Shreveport, Louisiana 71101

(3) Ms. Barbara B. Rutledge
Assistant Attorney General
State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

(4) Hon. William J. Guste, Jr.
Attorney General
State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dale G. Cox, Jr.

DALE G. COX, JR.
Counsel on Appeal
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

Paul J. Carmouche

PAUL J. CARMOUCHE
Trial Counsel
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

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APPENDIX "A"

CRIMINAL DOCKET
FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

Number 114,292

STATE OF LOUISIANA

v.

LEWIS T. GRAHAM

LADIES AND GENTLEMEN OF THE JURY:

Having heard the evidence and arguments of counsel, it now becomes my duty to instruct you on the law applicable to this case, after which you will be called upon to reach and render a verdict on the guilt or innocence of the accused.

I charge you, Ladies and Gentlemen, that you are the judges of the law and the facts. It belongs to you alone to determine the weight and credibility of the evidence. It is for you to decide what facts have, or have not, been proved. I am not permitted even to comment thereon. But, while you are also the judges of the law, it is your duty to accept and to apply the law as herein charged to you.

In determining the credibility of witnesses and the weight you will give to their testimony, you may take into consideration the probability or improbability of their statements, their opportunities for knowledge of the facts to which they testify, their demeanor on the stand, the interest or lack of interest they may have shown in the case, and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements. If you believe that any witness in the case, either for the State or for the defense, has wilfully and deliberately testified falsely to any material fact for the pur-

pose of deceiving you, then I charge you that you are justified in disregarding the entire testimony of such witness as proving nothing, and as unworthy of belief. You have the right to accept as true, or reject as false, the testimony of any witness as proving nothing, and as unworthy of belief. You have the right to accept as true, or reject as false, the testimony of any witness, in whole or in part, accordingly as you are impressed with his veracity.

I instruct you further, Ladies and Gentlemen, that you are to disregard any remarks that may have been made by the attorneys in the case insofar as they are inconsistent with the evidence that has been introduced or my instructions pertaining to the law.

I charge you that the fact that an accused stands before you charged with a crime by an indictment found by a Grand Jury creates no presumption against him. The indictment is a mere accusation or charge against him; it is not evidence of the defendant's guilt and you must not be influenced by it in considering the case.

On the contrary, every person accused of crime is presumed to be innocent. He is not required to prove his innocence, but there is imposed upon the State the burden of proving his guilt, by proving every essential element of the crime charged. In other words, a person accused of crime is presumed by law to be innocent until each element of the crime, or lesser included offense, necessary to constitute his guilt, is proven beyond a reasonable doubt. The State, however, is not required to prove this with absolute certainty; it is sufficient if the State shall prove the defendant's guilt beyond a reasonable doubt.

A reasonable doubt must be actual and substantial, as distinguished from a vague apprehension, and must arise from the evidence or from a lack of evidence. It is a doubt founded on reason, and not a mere conjecture and idle supposition unrelated to the evidence. It is such a doubt as would influence the decision of a reasonable man to act, or not to act, in the important affairs of his daily life. In short, a reasonable doubt is

such a doubt that reasonable men may entertain after a careful consideration of all things proper to be considered in the matter at hand.

It is the duty of the jury, in considering the evidence and in applying to that evidence the law as given by the Court, to give the defendant the benefit of every reasonable doubt arising out of the evidence or want of evidence in the case. I charge you therefore, that, after you have carefully considered all of the evidence, the arguments of counsel, and the charge of the Court in this case, if there is in your mind any reasonable doubt that the State has proved every essential element of the crime charged or lesser included offense, it is your duty to give the accused the benefit of the doubt and acquit him. If, on the other hand, the State has proved beyond any reasonable doubt every essential element of the crime charged, it is your duty to convict the defendant.

There are two methods by which facts can be established. These are direct and circumstantial evidence. Direct evidence is evidence bearing directly, and without the aid of inference or deduction, on the question at issue or the fact to be proved. Circumstantial evidence is the evidence of certain facts, from which are to be inferred the existence of other material facts, bearing upon the question at issue or the facts to be proved. Circumstantial evidence is legal and competent. The jury may convict upon circumstantial as well as upon direct evidence, but of the former, great caution should be used. The rule as to circumstantial evidence is: Assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. In other words, if any rational conclusion other than the guilt of the accused is consistent with that proof, then it is insufficient to convict. This rule applies only when the conviction depends entirely upon circumstantial evidence, so that if there is any direct evidence tending to connect the defendant with the commission of the crime charged, the rule does not apply.

APPENDIX "B"

La. R. S. 15:470

"No juror, grand or petit, is competent to testify to his own or his fellows' misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct or of the findings of the body of which he is or was a member."

APPENDIX "C"

422 So.2d 123 ('82) (pp. 132,133, 134)

(11,12) The problems presented by an experiment conducted by jurors on their own defy precise, systematic analysis. A juror is expected to draw upon his general knowledge and experience in deciding the case, and he is encouraged to participate in full and robust debate and deliberations with his fellows in reaching a verdict. However, he should not consider facts relating to the case unless introduced at trial under constitutional and legal safeguards. *State* v. *Sinegal*, 393 So.2d 684 (1981). Accordingly, when a juror passes beyond the record evidence in reaching a decision, whether a new trial will be granted depends upon the magnitude of the juror's deviation from his proper role, the degree to which the accused was deprived of the benefits of the constitutional and statutory safeguards and the likelihood that the impropriety influenced the jury's verdict. All of these elements must be weighed in determining whether there is a reasonable possibility that the defendant's right to a fair trial has been prejudiced.

The jurors' experiment in the present case does not represent a radical departure from our expectations that a juror will employ his own ordinary experience in the deliberations. Any normal human being will experience his share of childhood scrapes, razor nicks, blood test pricks and various other episodes producing practical knowledge of blood coagulation. To say that a juror could not pass a fraction of an inch beyond the record to recall and employ this type of practical knowledge in his deliberations is to ignore centuries of history and the true function of the jury. Cf. *United States ex rel Owen* v. *McMann*, 435 F.2d 813 (2d Cir. 1970), cert. denied 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed.2d 646. Although the juror's experiment in this case cannot be classified as proper conduct, it was performed within the jury room and dealt with a subject well within the experience and practical knowledge of all jurors. As contrasted with other cases, it did not involve jurors conducting tests of matters beyond their normal ken or going outside the jury room to obtain esoteric knowledge of special information

pertaining directly to the case. See e.g. *State* v. *Sinegal*, *supra; Durr* v. *Cook*, *supra*. Consequently, the danger that the juror's common sense would be overcome by the experiment's instructive or dramatic effect was well tempered by an average juror's practical experience with blood coagulation.

The jurors' timing of blood clots on a pricked finger did not deprive the defendant of the benefits of constitutional and legal safeguards to the same extent as other tests described in reported decisions. The experiment here did not depend heavily on the jurors' powers of observation or on the reliability and credibility of a juror's report upon phenomena observed outside the jury room. Cf. *Durr* v. *Cook*, *supra*. Consequently, the loss of an opportunity to confront and cross-examine those who conducted the experiment was not as potentially prejudicial to the defendant. Furthermore, the rules of evidence would not necessarily have barred the introduction of the blood clot test evidence in this case. Demonstrative evidence offered for its circumstantial value may be admitted within a broad discretionary power of the trial court to weigh the probative value of the evidence against whatever prejudice, confusion, surprise and waste of time are entailed. McCormick § 212, p.527. Consequently, the practical benefits the defendant lost because he was not able to assert his constitutional and legal rights at trial with respect to the experimental evidence were not of crucial magnitude in this case.

The juror's experiment tends to corroborate the prosecution expert witness' opinion that human blood coagulates in three to five minutes. In our opinion, however, there is not a reasonable possibility that the juror's experiment contributed decisively to the guilty verdict. In a different context another type of experiment could prevent a jury from recognizing a reasonable doubt or a reasonable hypothesis of innocence presented by the evidence. In the present case, however, there is no reasonable hypothesis of innocence and the evidence clearly supports a finding of guilt beyond a reasonable doubt even without the state's theory involving blood coagulation time. Moreover, the experiment in this case, when viewed in the context of the

evidence presented at trial and the ordinary experience most persons have had with blood coagulation does not appear to be so persuasive or dramatic as to skew the judgment of the jury or cause it to disregard the evidence presented at trial.

During the trial, Mr. McDonnell testified that human blood coagulates within three to five minutes. Based on this and his opinion that some of the blood on the defendant's clothes had coagulated before it was spattered on defendant, this expert witness expressed the opinion that defendant could not have received the blood spatters in the manner in which the defendant described the events surrounding the murder.

However, Mr. McDonnell admitted he had not tested the spots on the defendant's clothes to make certain they were from pre-coagulated blood. Mrs. Bunker cast doubt on his theory when she testified that the spatters could have been caused by particles of the victim's flesh mixed with blood which coagulates more rapidly than pure blood. Dr. Petty in giving testimony in relation to the coagulation of defendant's blood stated that the coagulation time of human blood varies with the circumstances of case and the individual. On the other hand, there is even less blood coagulation evidence supporting the defendant's hypothesis of innocence. There was no affirmative evidence at trial whatsoever to the effect that the victim's blood could have coagulated with the rapidity necessary to fit within the defendant's account of the crime events.

When we weigh all of the evidence pointing toward defendant's guilt against the defense's unlikely hypothesis of innocence, including defendant's unusual story of how he got his wife's blood spattered on both the front and back of his underclothes, all of the evidence concerning blood coagulation time recedes in importance. Ultimately, the blood coagulation theory is not essential to the state's case. Furthermore, the juror experiment added virtually nothing to the theory. At most, it was cumulative to Mr. McDonnell's opinion about blood coagulation time. Since his opinion was not disputed at trial, the corroborative effect of the experiment was slight. We do

not think Dr. Petty's testimony disputed the McDonnell opinion. He said the coagulation times can vary, but he was not asked about the three to five minute period as an average or normal time. Mr. McDonnell said that coagulation time for human blood is three to five minutes, but he was not asked if this interval could vary under any circumstances. In short, there was at most only a possible area of conflict between the two experts which was not explored or drawn into focus. On top of this, the whole foundation of McDonnell's coagulation theory was called into question by Bunker's testimony that defendant's clothes did not have precoagulated spatters and McDonnell's admission that he couldn't be positive that they did. In essence, the jury experiment was cumulative to a part of a state expert's testimony which was not disputed at trial and which was not essential to a prosecution case that excluded every reasonable hypothesis of innocence and formed the basis for a rational finding of guilt beyond a reasonable doubt."

APPENDIX "D"

Article 1, Section 17 Louisiana Constitution of 1974

."Section 17. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."

APPENDIX "E"

La. C. Cr. P. Article 782

"A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases."

APPENDIX "F"

La. R.S. 14:64

"A. Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years, without benefit of parole, probation or suspension of sentence."

APPENDIX "G"

422 So.2d ('82) (pp 129-131)

1. Sufficiency of Evidence (Assignment No. Seven)

Defendant contends that the evidence is constitutionally insufficient to support his conviction because all of the evidence was circumstantial as to his identity as the killer and did not exclude every reasonable hypothesis of his innocence. We conclude that this assignment is without merit. The hypothesis of innocence advanced by the defendant is not a reasonable one.

(1-3) The Due Process Clause of the Fourteenth Amendment requires this court to review the evidence upon which a criminal conviction is based to determine whether it is minimally sufficient. A defendant has not been afforded due process, and his conviction cannot stand, unless, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Additionally, we are governed by our statutory rule as to circumstantial evidence: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. R.S. 15:438.

In previous opinions we have attempted to formulate a single precept incorporating both standards. See, e.g., *State* v. *Austin*, 399 So.2nd 158 (La. 1981). ("Therefore, when we review a conviction based upon circumstantial evidence we must determine that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded." Id. p. 160) Upon further reflection, however, a merger does not appear to promote clarity but could lead to a distortion of the standards. A combination of the rules may incorrectly imply that, when all of the evidence of the defendant's guilt is circumstantial, due process requires more than evidence which would satisfy any rational juror of proof of guilt beyond a reasonable doubt. On

the other hand, an in-tandem articulation may seem improperly to diminish the requirement of the circumstantial evidence rule by implying that, in a close case, this court will defer to the jury's finding rather than follow its own determination of whether there is a reasonable hypothesis of innocence. Although in many instances separate and dual applications of the rules will yield the same result, out of an abundance of caution we will proceed to apply each standard separately, as it was given to us by the framers.

(4) The characterization of evidence as "direct" or "circumstantial" points to the kind of inference which is sought to be drawn from the evidence to the truth of the proposition for which it is offered. If the inference sought is merely that certain facts are true because a witness reported his observation and the assumption that witnesses are worthy of belief, the evidence is direct. When, however, the evidence is offered also for some further proposition based upon some inference other than merely the inference from assertion to the truth of the fact asserted, then the evidence is circumstantial evidence of this further fact-to-be-inferred. McCormick, § 185 p. 435. In the present case, although direct evidence was introduced to prove that the victim was murdered in her bed with a sledgehammer while the defendant was present, it qualifies only as circumstantial evidence of the crucial fact-to-be-inferred, i.e., that the defendant was the killer.

One hypothesis of innocence is suggested by defendant's arguments and testimony: Two or more intruders entered the Graham house on the night in question without awakening the Grahams or their three children, escaping the attention of the Graham's dog, and leaving only questionable signs of forcible entry. They picked up a sledgehammer and a knife in the house and preceeded to the main bedroom where the Grahams were sleeping. One or more of the intruders seized the defendant while another beat his wife's head with a sledgehammer. At this time, the front of the defendant's tee-shirt and shorts were spattered with his wife's blood. During a brief struggle, the defendant received a small one-stitch wound from the knife,

and was rendered unconscious when he was thrown against a wall. The intruders decided not to molest him anymore but continued to savagely beat his wife's head. Because the defendant came to rest face down he received blood spatters on the back of his tee-shirt and shorts in addition to that on the front. During or after the sledgehammer murder one or more of the intruders took a can of coins which defendant said contained $150 in dimes, but later the can was discarded in front of the house. They also scattered some bottles of liquor across the den floor and tampered with a set of binoculars. The murderers overlooked or were not interested in several items of value such as Mrs. Graham's diamond ring and an antique pistol. They departed without being seen by anyone, even the defendant who was unable to describe them, without disturbing or awakening any of the three children, and again without being detected by the family dog.

We do not think this is a reasonable interpretation of the situation, assuming every fact to be proved that the evidence tends to prove. The odds are heavily against the coincidence of the series of unlikely events upon which the hypothesis depends. The possibility that the murder occurred in this way is reduced further by the facts inconsistent with defendant's theory which the evidence also tends to prove. In comparison with the prosecution's hypothesis of defendant's guilt, which is consistent overall with the evidence, the defendant's circumstantial theory of innocence is remote.

Severally, the events of the defendant's hypothesis are each unlikely: A forcible yet silent, almost traceless entry by two unidentified and undescribed intruders; a heinous sledgehammer murder of a woman in her sleep by selective killers who had little malice toward her husband and none toward her children; a fortuitous manipulation of defendant's torso during the slaying that gave him the bloody coating of a murderer; a highly selective burglary by criminals who preferred dimes to other more precious valuables; a trackless disappearance of villains seen only by defendant, who silently, efficiently committed their bizarre crime with implements they discovered at the house and left no clues to their identities behind. The odds

against all of these events taking place in one criminal transaction are extremely high.

The hypothesis of defendant's innocence conflicts with several of the facts which the evidence tends to show. According to the state's expert witness, the cast off blood stains on defendant's shoulders were not consistent with his asserted facedown reclining position but were consistent with his guilt. The same expert's testimony tends to prove that there was coagulated blood on the front of defendant's underclothes which could not have been obtained consistently with defendant's story but which was consistent with his guilt.

There were many other details which were more fully consistent with the prosecution's theory than with a hypothesis of innocence. The blood spatters on defendant's shorts were denser than those on his tee-shirt, indicating a greater likelihood that he was standing when the spatters occurred. The blood spatters on both front and back of defendant's clothes were totally consistent with his role as the murderer. According to the state's experts no one's fingerprints but the defendant's were found on the knife. Although defendant claims he was cut with the knife before being thrown face down there was no blood at the place he said he landed. There were transfer patterns on defendant's tee-shirt consistent with the wiping of blood from an instrument such as a knife, although it could not be said conclusively that it was caused by the knife in the instant case.

(5) Consequently, we conclude that, assuming every fact that the evidence tends to prove, the evidence excludes every reasonable hypothesis of innocence. For all of the reasons expressed, we further conclude that defendant was not denied due process of law and that this conviction is clearly based upon evidence from which, when viewed in the light most favorable to the prosecution, a rational juror could find that the essential elements of defendant's crime had been proved beyond a reasonable doubt. Thus, the evidence is both constitutionally and statutorily sufficient to support the defendant's conviction.

APPENDIX "H"

La. R.S. 15:438

"The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."